~~1244~~ No. 3117 1245

United States
Circuit Court of Appeals
For the Ninth Circuit.

HOWARD J. PROFFITT ~~and WILLIAM E. HILL~~,
Plaintiff~~s~~ in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

No.

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HOWARD J. PROFFITT and WILLIAM E. HILL,
Plaintiffs in Error,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Plaintiffs in Error:

FRANK E. DOMINGUEZ and MILTON M. COHEN, Esqs., 703 California Building, Los Angeles, California.

WILL H. WILLIS, Esq., 637 Bryson Building, Los Angeles, California.

For Defendant in Error:

JOHN ROBERT O'CONNOR, Esq., United States Attorney, Federal Building, Los Angeles, California.

GORDON LAWSON and WILLIAM F. PALMER, Esqs., Assistant United States Attorneys, Federal Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

. . . . . .

UNITED STATES OF AMERICA, Plaintiff,	)	No. 1721 Criminal.
-vs-	)	CITATION ON WRIT OF ERROR.
HOWARD J. PROFFITT, et al, Defendants.	)	

. . . . . .

United States of America,
Southern District of California,
Southern Division, - - - SS.

To the United States of America, and to ROBERT O'CONNOR, U. S. Attorney for the Southern District of California, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Southern District of California, Southern Division, wherein HOWARD J. PROFFITT is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Los Angeles, California, in said District, this 17th day of June, 1919.

Oscar A.Trippet,
United States District Judge for the Southern District of California.

. . . . . .
Assistant United States Attorney.

[Endorsed]: ORIGINAL No. 1721 CRIMINAL In the United States District Court Southern District of California Southern Division UNITED STATES OF AMERICA, *Plaintiff vs.* HOWARD J. PROFFITT, et al., *Defendants* CITATION ON WRIT OF ERROR Received Copy of within Citation this 16th day of June 1919 W. F. Palmer Asst. U. S. Atty. for Plaintiff FILED JUN 17 1919 *Chas. N. Williams, Clerk* Ernest J.Morgan, *Deputy* FRANK E. DOMINGUEZ MILTON M. COHEN Attorneys for Defendant, HOWARD J. PROFFITT.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

. . . . . .

UNITED STATES OF AMERICA, Plaintiff,	No. 1721 Criminal.
-vs-	WRIT OF ERROR.
HOWARD J. PROFFITT and WILLIAM E. HILL, Defendants.	

UNITED STATES OF AMERICA - - ss.

The President of the United States of America, to the Honorable Judge of the District Court of the United States, for the Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said District Court, before you, between Howard J. Proffitt, plaintiff in error, and the United States of America, defendant in error, a manifest error has happened to the great damage of said Howard J. Proffitt, plaintiff in error, as by his complaint appears:

We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same to the United States District Court of Appeals for the Ninth District, together with this Writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals, may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 17th day of June, 1919.

(Seal) Chas. N. Williams
Clerk of the United States District of California, Southern Division.

. . . . . .

The within Writ of Error is hereby on this 17th day June 1919 ~~lodged~~ allowed.

Oscar A.Trippet,
Judge

[Endorsed]: ORIGINAL No. 1721 CRIMINAL In the United States District Court Southern District of California Southern Division UNITED STATES OF AMERICA, *Plaintiff vs.* HOWARD J. PROFFITT, et al., *Defendants* WRIT OF ERROR FILED JUN 17 1919 *Chas. N. Williams, Clerk* Ernest J Morgan, *Deputy* FRANK E. DOMINGUEZ MILTON M. COHEN Attorneys for Defendant, HOWARD J. PROFFITT.

Viol. Sec. 37 FPC. Conspiracy to violate Act Jan. 17, 1914.
" Act Jan. 17, 1914. Smuggling smoking opium.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

At a stated term of said Court, begun and holden at the City of Los Angeles, within the Southern

Division of the Southern District of California, on the second Monday of January, in the year of our Lord one thousand nine hundred and nineteen;

The Grand Jurors of the United States of America, duly chosen, selected and sworn, within and for the Division and District aforesaid, on their oath present:

That HOWARD J. PROFFITT, WILLIAM E. HILL, WILLIAM FRANK EDMONSON, LEE TONG, alias HOM HONG, and JOHN DOE SMITH, alias "COCKEYE" SMITH, hereinafter called defendants, whose full and true names are, and the full and true name of each is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 1st day of January, in the year of our Lord one thousand nine hundred and nineteen, and continuously thereafter up to and including the date of the filing of this indictment, at the City of Los Angeles, County of Los Angeles, within the Southern Division of the Southern District of California, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully, corruptly, fraudulently and feloniously conspire, combine, confederate and agree together, and with divers other persons whose names are to the Grand Jurors unknown, to commit an offence against the United States, to-wit: the offence of receiving, concealing, buying, selling and facilitating the transportation, concealment and sale of opium prepared for smoking, which said opium prepared for smoking then and there had been imported into the United States from a foreign

country, said foreign country and the place of importation are to the Grand Jurors unknown, after the first of April, 1909, contrary to law, the said defendants then and there knowing that the said opium prepared for smoking then and there had been so imported into the United States contrary to law; which said offense is defined by the Act of Congress approved January 17, 1914, and entitled, "AN ACT REGULATING THE MANUFACTURE OF SMOKING OPIUM WITHIN THE UNITED STATES AND FOR OTHER PURPOSES", the quantities of said opium prepared for smoking so to be received, concealed, bought and sold, and the transportation, concealment and sale of which was so to be facilitated, and a more particular description of the containers thereof are to the Grand Jurors unknown.

OVERT ACT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That thereafter, and on or about the eighth day of February, 1919, the said LEE TONG alias HOM HONG did knowingly, wilfully, unlawfully, corruptly, fraudulently and feloniously, and in furtherance of the said conspiracy, and to effect the object thereof, draw from the Bank of Italy at the corner of Temple and Spring Streets, in the City of Los Angeles, County of Los Angeles, within the Division and District aforesaid, and within the jurisdiction of this Honorable Court, the sum of Four Thousand Dollars ($4000) for the then and there purpose of purchasing from the said

JOHN DOE SMITH, alias "COCKEYE" SMITH, opium prepared for smoking,

OVERT ACT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That the said LEE TONG, alias HOM HONG, did knowingly, wilfully, unlawfully, corruptly, fraudulently and feloniously, and in furtherance of the said conspiracy, and to effect and accomplish the object thereof, on or about the 8th day of February, 1919, go to the City of Pasadena, County of Los Angeles, within the Division and District aforesaid, and within the jurisdiction of this Honorable Court, to the store of the Quong Wong Company, near the corner of California and Fair Oaks Streets, in the said City of Pasadena, to meet the said JOHN DOE SMITH, alias "COCKEYE" SMITH, for the then and there purpose of purchasing about fifty (50) cans of opium prepared for smoking of the sizes commonly called 5-tael and 4-⅛-tael.

OVERT ACT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That thereafter, on or about the 21st day of February, 1919, the said WILLIAM FRANK EDMONSON did knowingly, wilfully, unlawfully, fraudulently and feloniously, and in furtherance of the said conspiracy, and to effect and accomplish the object thereof, have in his possession while driving in an

automobile on the streets of the City of Los Angeles, County of Los Angeles, within the Division and District aforesaid, and within the jurisdiction of this Honorable Court, a can of opium prepared for smoking, of the size commonly called four and one-eighth tael.

OVERT ACT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That thereafter, on or about the 21st day of February, 1919, the said WILLIAM FRANK EDMONSON did knowingly, wilfully, unlawfully, corruptly, fraudulently and feloniously, and in furtherance of the said conspiracy, and to effect the object thereof, have in his possession at the Sherman Hotel, Room 312, at 314 West Fourth Street, in the City of Los Angeles, County of Los Angeles, within the Division and District aforesaid, and within the jurisdiction of this Honorable Court, one can of opium prepared for smoking, of the size commonly called five-tael.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

SECOND COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That HOWARD J. PROFFITT, WILLIAM E. HILL, WILLIAM FRANK EDMONSON, LEE TONG, alias HOM HONG, and JOHN DOE SMITH,

alias "COCKEYE" SMITH, hereinafter called the defendants, whose full and true names are, and the full and true name of each is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 8th day of February, in the year of our Lord one thousand nine hundred and nineteen, within the Division and District aforesaid, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully, fraudulently and feloniously receive, conceal, and facilitate the transportation and concealment of opium prepared for smoking, that is to say: the said defendants did, at the time and place aforesaid, take the said opium prepared for smoking in an automobile to a certain point in the said City of Los Angeles, said point is to the Grand Jurors unknown, and then and there did secrete and hide the said opium prepared for smoking, the quantity of said opium prepared for smoking so received and concealed, and the transportation and concealment of which was so facilitated, was contained then and there in about fifty (50) cans of the sizes commonly called 5-tael and 4-⅛-tael, the exact quantity of the said opium prepared for smoking, and the exact number of said cans is to the Grand Jurors unknown, which said opium prepared for smoking then and there had been imported into the United States from a foreign country, the said foreign country and the place of importation are to the Grand Jurors unknown, after the 1st day of April, 1909, contrary to law, the said defendants then

and there knowing that the said opium prepared for smoking then and there had been so imported into the United States contrary to law.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

THIRD COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That HOWARD J. PROFFITT, WILLIAM E. HILL, WILLIAM FRANK EDMONSON, LEE TONG alias HOM HONG, and JOHN DOE SMITH, alias "COCKEYE" SMITH, hereinafter called defendants, whose full and true names are, and the full and true name of each is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 21st day of February, in the year of our Lord one thousand nine hundren and nineteen, at the City of Los Angeles, County of Los Angeles, within the Division and District aforesaid and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully, fraudulently and feloniously receive and conceal, and facilitate the transportation and concealment of opium prepared for smoking, that is to say: the said defendants did at the time and place aforesaid take, and cause to be taken, in an automobile the said opium from the Sherman Hotel, 314 West Fourth Street in the said City of Los Angeles, to a certain point in that part of

the City of Los Angeles commonly called "Chinatown", the exact point is to the Grand Jurors unknown, which said opium prepared for smoking then and there was contained in one can of the size commonly called 4-⅛-tael, which said opium prepared for smoking then and there had been imported into the United States from a foreign country, the said foreign country and the place of importation are to the Grand Jurors unknown, after the 1st day of April, 1909, contrary to law, and the said defendants then and there knowing that the said opium prepared for smoking then and there had been so imported into the United States contrary to law.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

FOURTH COUNT.

And the Grand Jurors aforesaid, on their oath aforesaid, do further present:

That HOWARD J. PROFFITT, WILLIAM E. HILL, WILLIAM FRANK EDMONSON, LEE TONG alias HOM HONG, and JOHN DOE SMITH, alias "COCKEYE" SMITH, hereinafter called defendants, whose full and true names are, and the full and true name of each is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 21st day of February, in the year of our Lord one thousand nine hundred and nineteen, at the City of Los Angeles, County of Los An-

geles, within the Division and District aforesaid, and within the jurisdiction of this Honorable Court, did knowingly, wilfully, unlawfully, fraudulently and feloniously receive and conceal, and facilitate the transportation and concealment of, opium prepared for smoking, that is to say: the said defendants did, at the time and place aforesaid, take and cause to be taken the said opium prepared for smoking to the Sherman Hotel, 314 West Fourth Street, in said City of Los Angeles, and did place, and cause to be placed, in the said Sherman Hotel the said opium prepared for smoking, which said opium prepared for smoking then and there was contained in one can of the size commonly called 5-tael, and which said opium prepared for smoking then and there had been imported into the United States from a foreign country, said foreign country and the place of importation are to the Grand Jurors unknown, after the 1st day of April 1909, contrary to law, and the said defendants then and there knowing that the said opium prepared for smoking then and there had been so imported into the United States contrary to law.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

RobertO'Connor
United States Attorney.
GordonLawson
Assistant United States Attorney.

[Endorsed]: Form No. 195. *No.* 1721 Crim. UNITED STATES DISTRICT COURT, Southern

District of California Southern *Division.* THE UNITED STATES OF AMERICA *vs.* HOWARD J. PROFFITT, et al. INDICTMENT Viol. Sec. 37 FPC. Conspiracy. "Act Jan.17,1914. Smuggling smoking opium. *A true bill,* GEBittinger *Foreman.* FILED APR 18 1919 *Chas. N. Williams, Clerk.* Ernest J. Morgan, *Deputy*

AT A STATED TERM, to-wit: The January A. D., 1919 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 21st day of April, in the year of our Lord One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

United States of America, Plaintiff,	)	
vs	)	No. 1721 Crim.
Howard J. Proffitt, et al. Defendants.	)	

This cause coming on at this time for the Arraignment and Plea of the defendants; Gordon Lawson, Esq., Assistant U. S. Attorney, counsel for the Plaintiff, and Will H. Willis, Esq., counsel for defendants

Proffitt and Hill, also R. Kittrelle, Esq., counsel for Lee Tong, alias Hom Hong, present in open Court. Defendants Proffitt and Hill appeared in person on bail. Defendants Howard J. Proffitt and William E. Hill were arraigned and waived the reading of the indictment, and stated that their true names are as set forth in the indictment. On motion of Will H. Willis, Esq., it is by the Court ORDERED that said defendants be allowed to Wednesday, the 23rd day of April, 1919, to demur to said indictment and to present memorandum of points and authorities. On motion of counsel, it is further ordered that this cause be continued to Monday, the 28th day of April, 1919 for entry of plea of said defendants.

Defendant William Frank Edmonson appeared in person on bail without attorney, stated that his true name is William Franklin Edmonson. Good cause appearing it is ordered that this cause be continued to Monday, the 28th day of April, 1919, for further arraignment and plea of said defendant.

On motion of R. Kittrelle, Esq., counsel for defendant Lee Tong, Alias Hom Hong, who is not now present in Court, it is ORDERED that this cause be continued to Monday, April, 1919, for arraignment and plea.

AT A STATED TERM, to-wit: The January A. D., 1919 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the

City of Los Angeles, on Monday the 28th day of April, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,	)	
	)	
Plaintiff,	)	
	)	No. 1721 Crim.
vs	)	
	)	
Howard J. Proffitt, et al.	)	
	)	
Defendant.	)	

This cause coming on at this time for the plea of defendants Howard J. Proffitt and Wm. E. Hill; for the further arraignment and plea of Wm. Frank Edmonson; and for the arraignment and plea of Lee Tong, alias Hom Hong, said defendants all present in court on bail together with their counsel W. H. Dehun, Esq., representing Messrs. Cohen & Willis, Claude Morton, Esq., representing Guy Eddy, Esq., R. Kittrell, Esq., and Ralph Dominguez, Esq., Gordon Lawson, Esq., Assistant U. S. Attorney, counsel for the plaintiff.

The defendant Lee Tong, alias Hom Hong being duly called and arraigned, states to the Court that his true name is as contained in the indictment. Defendant Wm. F. Edmonson also stated to the Court that his true name is as contained in the indictment. All the defendants being required to plead to the indictment on file against them each waives the reading of the indict-

ment and enters his plea of Not Guilty, and it is by the Court ORDERED that the pleas now interposed by each and all of the defendants be and the same are hereby entered of record.

It is also by the Court ordered that the demurrer of defendants Proffitt and Hill to the Indictment be and the same is submitted.

It is further by the Court ORDERED that this cause be and the same is continued to the 6th day of May, 1919 for trial.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

. . . . . .

THE UNITED STATES OF AMERICA, Plaintiff,	)	
-vs-	)	DEMURRER TO INDICTMENT.
HOWARD J. PROFFITT, et al., Defendants.	)	

Come now the defendants Howard J. Proffitt and William E. Hill, and for themselves and for no other defendants demur to the indictment herein on the following grounds:

I.

That said indictment does not, nor does any count or paragraph thereof, state facts sufficient to constitute a

punishable offense, or any offense or crime against the laws or statutes of the United States of America.

II.

That said indictment does not substantially conform to, or comply with, the rejuirements of Section 950 of the Penal Code of the State of California, the state of which this court is holden.

III.

That said indictment does not substantially conform to or comply with the requirements of Section 951 of said Penal Code.

IV.

That said indictment does not substantially conform to or comply with the requirements of Section 952 of said Penal Code.

V.

That more than one offense is charged in said indictment except as provided in Section 954 of the Penal Code of the State of California, the state of which this court is holden.

VI.

That said indictment is not direct or certain as regards the particular circumstances of the offense attempted to be charged, and that said circumstances are necessary to be alleged in order to constitute a complete offense.

That said indictment is not direct or certain sufficiently to inform the defendants herein of the particular circumstance of the offense with which they are attempted to be charged.

That said uncertainty consists in the following matters:

(a) That it cannot be ascertained from the second count of said indictment how these demurring defendants did on or about the 8th day of February, 1919, or at any other time, in the Southern Division of the Southern District of California, or at any other place, receive or conceal or did facilitate in the transportation or concealment of opium.

(b) That it cannot be ascertained from a reading of the allegations in the third count of the indictment how these demurring defendants did, on or about the 21st day of February, 1919, or at any other time, in the Southern Division of the Southern District of California, receive or conceal or did facilitate in the transportation or concealment of opium.

(c) That it cannot be ascertained from a reading of the allegations in the fourth county of the indictment how these demurring defendants did on or about the 21st day of February, 1919, at the City of Los Angeles, *Count* of Los Angeles, State of California, receive or conceal or facilitate in the transportation or concealment of opium.

VII.

That second count in the said indictment does not conform to Section 37 of the Penal Code of the United States in that there is no statement or attempt at statement of any overt act in so far as these demurring defendants are concerned.

VIII.

That third count in the said indictment does not conform to Section 37 of the Penal Code of the United States in that there is no statement or attempt at statement of any overt act in so far as these demurring defendants are concerned.

IX.

That fourth count in the said indictment does not conform to Section 37 of the Penal Code of the United States in that there is no statement or attempt at statement of any overt act in so far as these demurring defendants are concerned.

X.

That the grand jury by which the indictment was found had no legal authority to inquire into the offense charged.

XI.

That second count in said indictment is bad, defective, and *duplitious;* that said second count is defective for the reason that there is a misjoinder of offenses; that more than one offense is charged in said second count of said indictment.

XII.

That third count in said indictment is bad, defective, and *duplitious;* that said third count is defective for the reason that there is a misjoinder of offenses; that more than one offense is charged in said third count of said indictment.

XIII.

That fourth count in said indictment is bad, defective, and *duplitious;* that said fourth count is defective

for the reason that there is a misjoinder of offenses; that more than one offense is charged in said fourth count of said indictment.

WHEREFORE, the defendants Howard J. Proffitt and William E. Hill pray that this demurrer be sustained and that said indictment be dismissed as to them.

Frank DominguezM MCohen Wm.Willis
ClaireWoolwine
Attorneys for Defendants Howard J. Proffitt and William E. Hill.

I hereby declare that the demurrer offered in the above entitled action on behalf of the defendants Howard J. Proffitt and William E. Hill is not presented for the purpose of delay but that the same is presented for the reason that counsel for said defendants believe that the points are well taken in law.

Frank E Dominguez
Attorney for said defendants.

[Endorsed]: 1721 Crim. ORIGINAL IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. THE UNITED STATES OF AMERICA, Plaintiff, -vs- HOWARD J. PROFFITT, et al., Defendants. DEMURRER TO INDICTMENT. Gordon Lawson ass't U.S.Atty FILED APR 22 1919 *at*55*min.past* 4 *o'clockP.M. CHAS. N. WILLIAMS, Clerk* Murray C.White*Deputy*. MILTON M. COHEN, 703 California Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

---o-o-o---

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. 1721 CRIM. DEMAND FOR SEPARATE TRIALS.
HOWARD J. PROFFITT, et al, Defendants.	)	

Now come the defendants Howard J. Proffitt and William E. Hill and for themselves and no other defendants demand separate trials in the above entitled cause. Said demand will be made upon the files in said action and the minutes of the Court.

Dated this 2nd day of May, 1919.

Frank EDominguez
Milton M. Cohen.
Attorneys for defendants
Hill and Proffitt.

[Endorsed]: ORIGINAL *No.* 1721 Crim. IN THE United States District Court IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA .....Division United States of America *Plaintiff vs.* Howard J. Proffitt et al *Defendant* Demand for Separate Trials *Received copy of the within this* 2 *day of* May *1919* Gordon Lawson Ass't U. S. Att'y FILED MAY 2 1919 *Chas. N. Williams, Clerk* Ernest J.Morgan *Deputy* Milton M. Cohen 703 CALIFORNIA BUILDING PHONE BROADWAY 2626 LOS ANGELES, CAL. *Attorney for* Defendants

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

---o-o-o---

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. 1721 Crim. DEMAND FOR BILL OF PARTICULARS.
HOWARD J. PROFFITT, et al, Defendants.	)	

Now come the defendants Howard J. Proffitt and William E. Hill and for themselves and no other defendants demand from the plaintiff in the above entitled cause a Bill of Particulars. Said Bill of Particulars is demanded for the reason that the defendants have no knowledge or information concerning the matter set forth in the indictment and they are without means of securing details or information; and that such information, if any exists, are now in the hands and possession of the plaintiff; that the defendants cannot prepare their defense or safely proceed to trial unless furnished with a Bill of Particulars showing in what regard or in what manner they have infracted any law of the United States of America.

Dated this 2nd day of May, 1919.

Frank E. Dominguez
Milton M. Cohen
Attorneys for defendants
Proffitt and Hill.

[Endorsed]: *No.* 1721 Crim. IN THE United States District Court IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA ..... Division United States of America *Plaintiff vs.* Howard J. Proffitt et al *Defendants* Demand for Bill of Particulars *Received copy of the within this*2 *day of* May *1919* Gordon Lawson Ass't U. S. Att'y FILED MAY 2 1919 *Chas. N. Williams, Clerk* Ernest J. Morgan *Deputy* Milton M. Cohen 703 CALIFORNIA BUILDING PHONE BROADWAY 2626 LOS ANGELES, CAL. *Attorney for* Defendants

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AT A STATED TERM, to-wit: The January A. D., 1919 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday the 2nd day of May, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs	)	No. 1721 Crim.
	)	
Howard J. Proffitt, et al.	)	
	)	
Defendant.	)	

This cause coming on at this time for the hearing of the demurrer to the Indictment of defendants Proffitt and Hill, Gordon Lawson, Esq., Assistant U. S. Attorney, Counsel for the plaintiff, and Milton H. Cohen, Esq., counsel for defendants Proffitt and Hill. Counsel for the respective sides present argument to the Court, whereupon, it is by the Court ORDERED that said demurrer be and the same is hereby taken under submission.

Counsel for the defendants also at this time presents a motion for a separate trial for the defendants Proffitt and Hill, which motion is by the Court Denied. Exceptions to the ruling allowed.

AT A STATED TERM, TO WIT: The January A. D., 1919 Term of the District Court of the United States within and for the Southern District of California held at the court room thereof in the City of Los Angeles, on the 26th day of May, in the year of our Lord, One Thousand Nine Hundred and Nineteen,

PRESENT

The Honorable Oscar A. Trippet, District Judge.

United States of America, Plaintiff,	:	
v.	:	No. 1721 Crim.
H. J. Proffitt, et al., Defendants.	:	

At this time it is by the Court ORDERED that the demurrer to the indictment of defendants Howard J.

Proffitt and Wm. E. Hill heretofore submitted to the Court for its consideration and decision, be and the same is hereby overruled. And thereafter, exceptions to the ruling of the Court were allowed.

AT A STATED TERM, to-wit: The January A. D., 1919 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday the 27th day of May, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs	)	No. 1721 Crim.
	)	
Howard J. Proffitt, et al.	)	
	)	
Defendant.	)	

This cause coming on this day for trial before the Court and a jury to be impanelled, Gordon Lawson, Esq., and Wm. F. Palmer, Esq., Assistant United States Attorneys, counsel for the plaintiff, the defendants Howard J. Proffitt and Wm. E. Hill and their Counsel Frank E. Dominguez, Esq., Milton E. Cohen, Esq., and Will H. Willis, Esq., the defendant Wm. F. Edmondson and his counsel Guy Eddie, Esq., and the defendant Lee Tong and his counsel R. Kittrelle, Esq.,

all present in open Court. Edward de St. Maurice, an official shorthand reporter of the testimony and proceedings present and acting as such.

On the motion of Guy Eddie, Esq., it is by the Court ORDERED that Claude Morton, Esq., be and he is hereby associated with him as counsel.

At this time with the permission of the Court, the defendant Wm. Frank Edmonson changes his plea of not guilty heretofore entered herein to that of Guilty, which plea now interposed by the defendant is ordered entered herein. On motion of Gordon Lawson, Esq., it is by the Court ORDERED that the same be continued to the 16th day of June, 1919, at the hour of 2 o'clock P. M., for the imposing of sentence.

Yon Chung Hong an official interpreter being duly called is at this time sworn to interprete Chinese into English and English into Chinese as may be required of him.

Both sides having announced ready and the Court having ordered that the trial proceed; thereupon the following twelve (12) names of petit jurors were duly drawn, called and sworn on voir dire, to-wit: Wm. F. Kerr, Geo. F. Pennebaker, Morris Ellis, Grant E. McCarthy, Joseph Boylson, F. F. Bazzenni, Noah B. Dewey, Fred Albert Barman, G. H. Welch, R. M. Seeley, J. W. Jump and Chauncy E. Hartwell and said jurors having been duly examined for cause by counsel for the respective parties and the Court and passed and Geo. F. Pennebaker and R. M. Seeley having been peremptorily challenged by counsel for the defendant and by the Court excused; the names of the following

named petit jurors were drawn from the box, to-wit: Thomas C. Bundy and E. L. Eldredge, and said jurors having been sworn on voir dire and examined by respective parties and the court and passed for cause; and said jurors now in the box having been accepted by counsel for the respective parties are thereupon sworn as jurors to try the cause, and said jury so impanelled and duly sworn consisting of the following named jurors, to-wit:

1. Wm. F. Kerr
2. Thomas C. Bundy
3. Morris Ellis
4. Grant E. McCarthy
5. Joseph Boylson
6. F. F. Bazzenni
7. Noah B. Dewey
8. Fred Albert Barman
9. G. H. Welch
10. E. L. Eldredge
11. J. W. Jump
12. Chauncy E. Hartwell

NOW, at the hour of 11:20 o'clock A. M., the Court having duly admonished the jurors that during the progress of this trial that they are not to speak to other persons about the cause, nor permit other persons to speak to them about the same, and that until this cause is given them for consideration, under instructions of the Court, they are not to speak to each other about the same, nor anything in connection therewith, a recess is taken until the hour of 11:35 o'clock A. M. Now, at the hour of 11:35 o'clock A. M. court having reconvened and all being present as before and the Court having announced that all the jurors are present and all being present the trial is proceeded with.

At this time, R. Kittrelle, Esq., counsel for defendant Lee Tong asks permission of the Court for said defendant Lee Tong to change his plea of Not Guilty

heretofore entered herein to that of Guilty, which is by the Court granted. It is thereupon by the Court ORDERED that the plea of Guilty now interposed by the defendant Lee Tong be and the same is hereby entered herein. On motion of Gordon, Esq., counsel for the plaintiff it is by the Court Ordered that the same be continued to the 16th day of June, 1919, at the hour of 2 o'clock P. M., for the imposing of the sentence.

Gordon Lawson, Esq., counsel for the plaintiff makes an opening statement of the cause to the Court and Jury.

At this time upon the motion of Frank E. Dominguez, Esq., counsel for the defendants Proffitt & Hill it is by the Court ORDERED that all witnesses be excluded from the Courtroom except when testifying and admonishes them that they are not to converse about the trial amongst themselves nor other persons.

Now, at the hour of 11:50 o'clock A. M. a recess is taken until the hour of 2 o'clock P. M., the Court giving the jury the usual admonition. Now at the hour of 2:00 o'clock P. M., court having reconvened, counsel and shorthand reporter being present as before and the Court having announced that the jurors are present and all being present, the trial hereof is proceeded with.

Woo Hay being duly called and sworn testifies on behalf of the plaintiff and in connection with the testimony offers in evidence the following named exhibit which was admitted and ordered filed, to-wit:

Plaintiff's "Ex. 1" receipt to Bank of Italy for $4000.00 dated 2/10/19;

Lee Tong being duly called and sworn testifies on behalf of the plaintiff and in connection with the testimony plaintiff offers in evidence for identification the following named exhibits, to-wit:

Plaintiff's "Ex. 2, for identification", can of opium (5 tael) marked for identification;

Plaintiff's "Ex. 3, for identification", can of opium (4-⅛ Tael) marked for identification.

Now at the hour of 3:33 o'clock P. M., after duly admonishing the jury, a recess is taken until the hour of 3:43 o'clock P. M. Now at the hour of 3:43 o'clock P. M. Court having reconvened and all being present as before and the court having announced the jurors present and all being present, the trial hereof is proceeded with.

Plaintiff's witness Lee Tong resumes the stand on behalf of the plaintiff.

Now at the hour of 4:25 o'clock P. M., the Court having given the jury the usual admonition this cause is by the Court continued to Wednesday, May 28, 1919 at the hour of 10:00 o'clock A. M., for further trial before the Court and jury, until which time the jurors herein are excused.

On motion of Gordon Lawson, Esq., Assistant U. S. Attorney, counsel for the plaintiff, and good cause appearing therefor, it is by the Court ORDERED that the defendant William E. Hill be taken into custody by the U. S. Marshal.

AT A STATED TERM, to-wit: The January A. D., 1919 Term of the District Court of the

United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Wednesday the 28th day of May, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,	)	
	)	
Plaintiff,	)	
	)	No. 1721 Crim.
vs	)	
	)	
Howard J. Proffitt, et al.	)	
	)	
Defendant.	)	

This cause coming on at this time for further trial before the Court and a jury heretofore impanelled, all parties being present as before and the Court having announced the jury as present and all being present, the trial hereof is proceeded with.

Wong Hing and Wong Wing each being duly called and sworn testify on behalf of the plaintiff.

Now, at the hour of 11:25 o'clock A. M., after duly admonishing the jury, a recess is taken until the hour of 11:35 o'clock A. M. Now, at the hour of 11:35 o'clock A. M. Court having reconvened and all being present as before and the Court having announced the jurors as present and all being present the trial hereof is proceeded with.

Plaintiff's witness Wong Wing resumes the stand and testifies further on behalf of the plaintiff.

Now, at the hour of 12:00 o'clock M. the Court duly admonished the jury and a recess is taken until the hour of 2:00 o'clock P. M. until which time the said jurors are excused; Now at the hour of 2:00 o'clock P. M. court having reconvened and all being present as before and the court having announced the jurors as present and all being present the trial hereof is proceeded with.

Billy Wong Tong, Wm. Teddy Neville, Chas. A. Jones, D. McD Jones and Geo. M. Littlejohn each being duly called and sworn testify on behalf of the plaintiff.

D. McD. Jones is recalled and testifies further on behalf of the plaintiff.

Charles Henry Jarvis being duly called and sworn testifies on behalf of the plaintiff;

At this time in connection with the testimony of the above named witnesses plaintiff offers in evidence exhibits Nos. 2 and 3 heretofore marked for identification, and which are at this time admitted and ordered filed.

Now, at the hour of 3:10 o'clock p.m., after duly admonishing the jury, a recess is taken until the hour of 3:20 o'clock P. M. Now, at the hour of 3:20 o'clock P. M., court having reconvened and all being present as before and the court having announced the jury as present and all being present, the trial hereof is proceeded with.

Wm. Frank Edmonson and Oscar S. Sellier each being duly called and sworn testifies on behalf of the plaintiff.

Now, at the hour of 4:27 o'clock P. M., the court having given the jury the usual admonition this cause is by the Court continued to Thursday, May 29, 1919 at the hour of 10:00 o'clock A. M., for further trial before the Court and a jury, until which time the jurors herein are excused.

At this time counsel for the defendant Wm. E. Hill moves the court to admit the defendant Hill to bail, which motion is opposed by the United States Attorney and after argument by all parties, the Court continued the matter for further argument.

AT A STATED TERM, to-wit: The January A. D., 1919 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Thursday, the 29th day of May, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs	)	No. 1721 Crim.
	)	
Howard J. Proffitt, et al.	)	
	)	
Defendant.	)	

This cause coming on at this time for further trial before the Court and a jury heretofore impanelled, all parties being present as before and the Court having announced the jury as present and all being present, the trial hereof is proceeded with.

After further argument by the Court and counsel, it is ordered that the defendant Wm. E. Hill be released from the Custody of the United States Marshal upon his giving bond for his appearance for trial in the sum of $10,000.00 to be conditioned and given as security for his good behaviour and his keeping the peace as provided in Sec. 270 Judicial Code and it is further ORDERED that the present bond of $1000 be and the same is hereby exonerated.

Mrs. George S. Fisher, Cyrus D. Rhodes, James McKain and Gertrude Moran each being duly called and sworn testify on behalf of the plaintiff

The plaintiff rests with the privilege of calling its witness Mrs. Ethel Laietsky, who is sick, when she is able to come into Court.

Frank E. Dominguez, Esq., for the defense makes an opening statement to the Court and jury.

Roy B. Holmes being duly called and sworn testifies on behalf of the defendant.

Now, at the hour of 11:25 o'clock A. M., after duly admonishing the jury a recess is taken until the hour of 11:35 o'clock A. M. Now, at the hour of 11:35 o'clock A. M., court having reconvened and all being present as before the trial hereof is proceeded with.

Defendant's witness Roy B. Holmes resumes the stand and testifies further on behalf of the defendant. In connection with the testimony plaintiff offers in evidence the following named exhibit which was admitted and ordered filed, to-wit:

Plaintiff's "Ex. 4", Repair Record Card, Roy B. Holmes' Garage;

Now, at the hour of 12:15 o'clock P. M., the Court having given the jury the usual admonition this cause is by the Court continued to Tuesday, June 3, 1919 at the hour of 10:00 o'clock A. M., for further trial before the Court and jury, until which time the jurors herein are excused.

It is further by the Court ORDERED that this cause be continued to 3:00 o'clock P. M., this day for argument as to the admissibility of certain evidence.

AT A STATED TERM, to-wit: The January A. D., 1919 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday the 3rd day

of June, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs	)	No. 1721 Crim.
	)	
Howard J. Proffitt, et al.,	)	
	)	
Defendant.	)	

This cause coming on at this time for further trial before the Court and a jury heretofore impanelled, all parties being present as before and the court having announced the jury as present and all being present, the trial hereof is proceeded with.

Ethel Laietsky being duly called and sworn testifies on behalf of the plaintiff.

Roy B. Holmes, recalled and testifies further on behalf of the defendants.

P. H. Burgess, George K. Home, and Claudia R. Proffitt each being duly called and sworn testify on behalf of the defendants.

Now, at the hour of 11:35 o'clock A. M., after duly admonishing the jury a recess is taken until the hour of 11:45 o'clock A. M., now, at the hour of 11:45 o'clock A. M. court having reconvened and all being present as before the trial hereof is proceeded with.

Claudia R. Proffitt is recalled and testifies further on behalf of the defendants.

U. S. McIntosh and Beulah Porter Hill each being duly called and sworn testify on behalf of the defendants.

Now, at the hour of 12:25 o'clock P. M., the Court duly admonished the jury and a recess is taken until the hour of 2:00 o'clock P. M. until which time the said jurors are excused; Now, at the hour of 2:00 o'clock P. M., court having reconvened and all being present as before and the court having announced the jurors as present and all being present the trial hereof is proceeded with.

C. G. Stadfield, Hamilton Forline, and Edward L. Menier each being duly called and sworn testify on behalf of the defendants. In connection with the testimony defendant offers in evidence the following named exhibits which were admitted and ordered filed, to-wit:
Defendant's "Ex. A", 3 job slips of the Roy B. Holmes Garage;
Defendant's "Ex. B, C. D, E, F, & G", being job slips of the Roy B. Holmes Garage;

Defendant's witness Edward L. Menier being recalled testifies as plaintiff's witness;

Edward D. Zehner, David S. Larimer, Edwin A. Bradley, Charles A. Whitehead, Paul J. Braud, Henry W. Mallmann, Herbert A. Squire, E. B. Giles, Roscoe L. Cannon and Albert A. Kendrick each being duly called and sworn testify as character witnesses on behalf of the defendant.

Defendant at this time offers in evidence for identification only, the following named exhibit, to-wit:

Defendant's "Ex. for identification, No. H" Doctor's certificate as to condition of Tom Ingraham.

Westley Austin, William D. Sutton and Howard J. Proffitt each being duly called and sworn testify on behalf of the defendants.

A. W. Saline being duly called and sworn testifies on behalf of the defendants.

Howard J. Proffitt being recalled testifies further on his own behalf.

Now, at the hour of 5:00 o'clock P. M., the Court having given the jury the usual admonition this cause is by the Court continued to Wednesday, the 4th day of June, 1919 at the hour of 10:00 o'clock A.M., for further trial before the Court and jury, until which time the jurors herein are excused.

DEFENDANTS' PROPOSED INSTRUCTION NO. 1

You are further instructed that you are the sole judges of the credit to be given to the testimony of the different witnesses, and that you are not bound to believe anything to be a fact merely because a witness states it to be so—provided you believe, from the evidence, that such witness is mistaken, or has knowingly testified falsely.

You are further instructed that you are the exclusive judges of the credibility of the witnesses that have testified and that you have the right to determine,

from their character and conduct, from the appearances of the witnesses on the stand, their manner of testifying, their apparent candor, fairness and intelligence, their relation to the parties, their bias or impartiality, the strength or weakness of their recollection, and from all other surroundings appearing on the trial, which witnesses are worthy of credit, and to give credit accordingly. A witness false in one part of his testimony is to be distrusted in others; that is to say, the jury may reject the whole testimony of a witness who has wilfully sworn falsely as to a material point; and the jury being convinced that witness has stated what was untrue, not as the result of mistake or inadvertence, but wilfully and with the design to deceive, must treat all with distrust and suspicion unless they shall be convinced notwithstanding the base character of the witness, that he has in other particulars sworn to the truth.

You are further instructed that counsel as well as the court have the right under the law to comment on the facts disclosed by the evidence, but you are not bound to be influenced by anything which counsel or the court may argue, you being the exclusive judges of the credibility of the witnesses, and in this regard you may, in your discretion, disregard what has been argued to you concerning questions of fact, that being entirely and solely your exclusive right, for after all, it is for you to

DEFENDANTS' PROPOSED INSTRUCTION NO. 1 (Cont'd)

finally determine just what conclusions should be drawn from the facts as you hear the same from the witnesses, and the law which the court will give you.

DEFENDANTS' PROPOSED INSTRUCTION NO. 2.

You are instructed that while you are permitted to consider and even to convict a defendant of a crime against the United States upon the testimony of an accomplice, yet you are further instructed that it is your duty to consider with great care and circumspection the testimony of an accomplice or co-defendant and, if you are not satisfied beyond a reasonable doubt concerning their testimony, considering their interests also in the prosecution, considering that they have already plead guilty to the indictment, and they having nothing further to lose by their testimony, it is your duty to give the defendants Hill and Proffitt the benefit of the doubt and acquit them.

DEFENDANTS' PROPOSED INSTRUCTION NO. 3.

You are further instructed that, even though you believe that on February 9, 1919, at Pasadena, one of the defendants, Lee Tong, alias Hom Hong, was robbed of his money by the defendant, "Cockeye" Smith, another defendant, yet unless you are further satisfied beyond all reasonable doubt that the defendants Proffitt and Hill were concerned and interested in said robbery, you would not be justified in per-

mitting that evidence to influence your mind in the least degree against the defendants.

DEFENDANTS' PROPOSED INSTRUCTION NO. 4.

The rule is that where circumstantial evidence is used for the purpose of proving the charge of conspiracy, first, that the hypothesis of the delinquency or guilt of the defendants charged in the indictment should flow naturally from the facts proven, and be consistent with them all; second, that the evidence must be such as to exclude every reasonable hypothesis but that of the guilt of the defendants of the offense imputed to them, or in other words, the facts proven must all be consistent with and point to their guilt only, and must be inconsistent with innocence.

DEFENDANTS' PROPOSED INSTRUCTION NO. 5

Conspiracy is an unlawful and corrupt combination or agreement or confederation entered into knowingly between two or more persons by concert of action, to accomplish some criminal or unlawful purpose, or some lawful purpose by criminal or unlawful means. In this case the charge is a conspiracy to accomplish a criminal act, to wit, the violation of the statutes relating to the possession, transportation, etc., of opium contrary to the laws of the United States.

DEFENDANTS' PROPOSED INSTRUCTION NO. 6.

A criminal combination or conspiracy going to make up conspiracy is the gist of the offense charged against

the defendants on the first count, and you must first be satisfied by the evidence beyond a reasonable doubt that the agreement, combination or conspiracy as set out in the indictment was in fact made, formed or entered into by the defendants or some two or more of them. Though this agreement need not be a formal agreement between the parties, yet it must be actual and real, and its existence must be established to your satisfaction beyond a reasonable doubt.

DEFENDANTS' PROPOSED INSTRUCTION NO. 7

If you believe from the evidence that any one or more of the defendants did not know that the things, or any of the things, which it is alleged they conspired to do, were in violation of a Federal law, you must acquit such defendant or defendants of the charge of conspiracy; and if you have a reasonable doubt from all the evidence or from a lack thereof, whether or not one or more of the defendants had such knowledge, you must resolve that doubt in favor of such defendant or defendants and acquit him or them of said conspiracy charge.

DEFENDANTS' PROPOSED INSTRUCTION NO. 8.

The court instructs the jury that an alibi simply means that the accused was at another place at the time the crime charged is alleged to have been committed and, therefore, could not have committed it. All of the evidence should be carefully considered by

you and if the evidence on this subject, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant or defendants, you should acquit him or them. The accused is not required to prove an alibi beyond a reasonable doubt, or even by a preponderance of evidence; it is sufficient to justify an acquittal if the evidence on that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you find that a crime was committed, and you will understand, also, that the attempt of the accused to prove an alibi does not shift the burden of proof from the prosecution, but that the prosecution is bound to prove his presence beyond a reasonable doubt.

The court further instructs the jury that the burden of proving the presence of the defendants, or either of them, at the time and place of the alleged offense as mentioned in the indictment, devolves upon the Government, and the Government must prove beyond a reasonable doubt that they were present at the time of the alleged commission of the overt acts. It does not devolve upon the defendants to prove that they were not present. So that if, after a full and fair consideration of all the facts and circumstances in evidence, whether arising from the Government's evidence or that adduced by the defendants, you have a reasonable doubt as to whether defendants were at the place of the alleged crime at the time of its commission, or were in another place, you are bound to give the defendants the benefit of such doubt and acquit them.

The court instructs the jury that the defense in this case is what is known in law as an alibi; that is, that the defendants were not present at the time, to wit, February 9, 1919, and place,

DEFENDANTS' PROPOSED INSTRUCTION NO. 8 (Cont'd).

Pasadena, the place of the commission of the overt act as charged in the indictment, but that they were at that time at another and different place. As to this defense, you are instructed that it is not necessary for defendants to prove an alibi to your satisfaction, beyond a reasonable doubt, nor by a preponderance of the evidence, but if, after full and fair consideration of all the facts and circumstances in evidence, you entertain a reasonable doubt as to whether or not the defendants were present at the time and place of the commission of the offense charged in the indictment, if such offense has been committed by anyone, it will be your duty to give the defendants the benefit of such doubt and acquit them.

DEFENDANTS' PROPOSED INSTRUCTION NO. 9.

The court instructs the jury that one of the defenses interposed by the defendants in this case is what is known as an alibi, that is, that the defendants were at another place at the time of the commission of the crime. The court instructs the jury that such defense is as proper and legitimate if proven as any other and all evidence bearing upon that point should be carefully

considered by the jury. If, in view of all the evidence, the jury have a reasonable doubt as to whether the defendants were in some other place when the crime was committed, they should give the defendants the benefit of the doubt and find them not guilty. As regards the defense of an alibi, the jury are instructed that the defendants are not required to prove that defense beyond a reasonable doubt to entitle them to an acquittal—it is sufficient if the evidence raises a reasonable doubt of their presence at the time and place of the commission of the crime charged.

The court instructs the jury that if you do not believe from the evidence that defendants were present at the time and place when and where the offense, if any, was committed, but that they were at some other and different place, or if you have a reasonable doubt as to whether this is the case, then you will find them not guilty. The defendants are presumed to be innocent until their guilt is established by legal evidence beyond a reasonable doubt; and if you have a reasonable doubt of their guilt you will acquit them.

DEFENDANTS' PROPOSED INSTRUCTION NO. 10

The court instructs that the statements of an accomplice made out of court, not in the presence of the defendants, admitting his guilt or accusing the defendants of the commission of an offense, or accusing the defendants of being co-conspirators of such an accomplice, are a doubtful species of evidence and should be acted upon by the jury with great caution.

DEFENDANTS' PROPOSED INSTRUCTION NO. 11

You are instructed that extra judicial admissions of defendants are to be received and considered with great caution, and that oral admissions of a party should be viewed with caution.

DEFENDANTS' PROPOSED INSTRUCTION NO. 12

The jury are instructed that if one set or chain of circumstances leads to two opposing conclusions, one pointing to the guilt, the other to the innocence of the defendants, and the jury have any reasonable doubt as to which of such conclusions the chain of circumstances leads, a reasonable doubt is thereby created and the defendants should be acquitted.

DEFENDANTS' PROPOSED INSTRUCTION NO. 13

Mere probabilities are not sufficient to warrant the conviction of the defendants, nor is it sufficient that the greater weight or preponderance of the evidence supports the charge against them, nor that upon the doctrine of chances that it is more probable that the defendants are guilty than innocent, but to warrant a conviction of the defendants, they must be proved to be guilty so clearly and conclusively that there is no reasonable theory under the law and the evidence upon which they can be innocent.

DEFENDANTS' PROPOSED INDICTMENT NO. 14.

You are instructed that the defendants Proffitt and Hill are charged in the first count of the indictment with conspiracy with certain other defendants therein named. It is not only incumbent upon the part of the Government to show beyond a reasonable doubt that a conspiracy was formed and existed, but that the defendants Hill and Proffitt knew that such a conspiracy had been formed and that in pursuance of said conspiracy they did commit or do some overt act in furtherance of the said conspiracy, and in this connection it is not sufficient that you should believe that the probabilities are greater that the said defendants Proffitt and Hill, and upon the doctrine of chance believe, that they did commit some act in furtherance of said conspiracy, but you must be satisfied not only by a preponderance of evidence, but by evidence beyond a reasonable doubt that they did commit some act in furtherance of said conspiracy before you would be justified under the law in finding them guilty.

DEFENDANTS' PROPOSED INSTRUCTION NO. 15

You are instructed that the presumption of innocence prevails throughout the trial and that it is the duty of the jury, if possible to reconcile the evidence with this presumption. That the law presumes a man innocent of crime until he is proven guilty beyond a reasonable doubt; and the law also presumes that every act of the defendants charged with the crime is lawful

and honest, and in determining the guilt of the defendants in this case, it is the duty of the jury to account for the actions and statements of the defendants as being lawful and innocent if the same can be done by any reasonable or fair construction of the whole evidence in the case. And if the jury, after considering all the evidence in the case entertains a reasonable doubt as to whether or not the defendants are guilty, then the jury should give the defendants the benefit of the doubt and acquit them.

DEFENDANTS' PROPOSED INSTRUCTION NO. 16

You are instructed that in order to convict the defendants on circumstantial evidence, the evidence should be such as to produce the same degree of certainty as that which arises from direct testimony. And if you do not believe from the evidence, beyond a reasonable doubt, that the defendants committed the crime with which they are charged, you must find the defendants not guilty.

DEFENDANTS' PROPOSED INSTRUCTION NO. 17

The court instructs the jury that a reasonable doubt is one arising from a candid and impartial investigation of all the evidence, or based upon the want of evidence, and such as would cause a reasonable, prudent and considerate man to hesitate and pause before acting in the graver and more important affairs of life. Reasonable doubt arises from a mental oper-

ation and exists in the mind when the judgment is not fully satisfied as to the truth of a criminal charge. It is that state of the case which, after an entire comparison of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charges, that is, to a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

DEFENDANTS' PROPOSED INSTRUCTION NO. 18

If, after consideration of the whole case, any juror shall entertain a reasonable doubt of the guilt of the defendants, it is the duty of such juror so entertaining such doubt not to vote for a verdict of "Guilty," nor to be influenced to so vote.

The defendants are presumed to be innocent until proven guilty; that presumption accompanies them throughout the trial; it goes with you into your retirement to consider your verdict and operates until you have arrived at a verdict. This presumption will avail to acquit the defendants unless it be overcome by sufficient proof of their guilt to a moral certainty and beyond all reasonable doubt. You must examine the evidence by the light of that presumption and unless, upon examining it, you find the evidence sufficiently strong to overcome the presumption of innocence- - -to remove it- - -and moreover to satisfy you of the guilt of the defendants, beyond all reasonable doubt, the de-

fendants are entitled to a verdict of acquittal at your hands.

DEFENDANTS' PROPOSED INSTRUCTION NO. 19

You are instructed that in this case the law raises no presumption against the defendants and the fact that they are charged with the crime alleged, and that an indictment has been filed against them is no evidence of their guilt and should raise no presumptions of such fact in the minds of the jury; but every presumption of law is in favor of their innocence and in order to convict them of the crime alleged in the indictment every material fact necessary to constitute such crime must be proved beyond a reasonable doubt; and if the jury entertain a reasonable doubt upon any single fact or element necessary to constitute such crime, it is their duty to give the defendants the benefit of such doubt and acquit them.

DEFENDANTS' PROPOSED INSTRUCTION NO. 20

It is not your duty to look for some theory upon which to convict the defendants, but, on the contrary, it is your duty, and the law requires you, if you can reasonably do so, to reconcile any and all circumstances that have been shown with the innocence of the defendants, and so acquit them.

DEFENDANTS' PROPOSED INSTRUCTION NO. 21

The defendants in this case are presumed by law to be innocent of any crime until their guilt of such

crime and every essential element thereof is established beyond a reasonable doubt.

It is incumbent upon the prosecution to prove every material element of the offense charged beyond a reasonable doubt, and if you have such reasonable doubt as to whether they have proved or have failed to prove any one essential and material fact going to make up their guilt, it is your sworn duty to acquit them.

It is by law considered better that any number of guilty persons should escape than to adopt a course under which an innocent person might be convicted because of an erroneous conclusion of court or jury.

Hence it is that defendants cannot be convicted unless their guilt is established by more than a preponderance of evidence. It is not enough that you should believe in their guilt to such an extent that would make you willing to act in the ordinary affairs of life, even of the greatest importance. This will not do. Before you can find these defendants guilty, you must be satisfied of their guilt to a moral certainty and beyond a reasonable doubt.

DEFENDANTS' PROPOSED INSTRUCTION NO. 22

The court instructs you that individual jurors ought not to compromise any well founded doubt of guilt that he may entertain respecting the defendants, with his fellow jurors. You can agree only to convict or acquit, and as you can properly convict only when the guilt of the defendants is so fully and clearly proven

to the mind of each individual juror as to exclude every rational doubt of guilt, therefore, unless the evidence is so credible and convincing as to leave not one rational doubt of guilt, the jury ought to acquit the defendants.

DEFENDANTS' PROPOSED INSTRUCTIONS NO. 23

In considering the evidence, if you can reasonably account for any fact in this case on a theory or hypothesis which will admit of defendants' innocence, it is your duty under the law to do so and to reject any theory or supposition on which it might point to their guilt, even though such theory may be reasonable and much more probable than the one which admits of their innocence.

DEFENDANTS' PROPOSED INSTRUCTION NO. 24

You are instructed that in all criminal cases the law permits a defendant to introduce evidence concerning his general good reputation upon the points of character involved in the special case under consideration; and in this case the law permits the defendants to introduce and they introduced evidence of their good character, honesty and integrity; and you are instructed that if such good character has been satisfactorily shown, it is a fact which must be taken into consideration in determining the guilt or innocence of the defendants, and you are instructed that the reputation of the defendants in the respects above indicated may

of itself be sufficient to create in your minds a reasonable doubt, and if it does create such reasonable doubt as to their guilt, then you should give them the benefit of the doubt and acquit them.

DEFENDANTS' PROPOSED INSTRUCTION NO. 25

The court instructs the jury as a matter of law, that should you find from the evidence in this case, that prior to the date mentioned in the indictment these defendants bore in the neighborhood in which they lived, a good general reputation for truth and veracity, honesty and integrity, that if such fact is found to be proved by the evidence in this case, may of itself be sufficient to generate in your minds a reasonable doubt upon which you may acquit the defendants.

If you find from the evidence in this case, that the defendants have proved good general reputation as to truth and veracity, honesty and integrity, the law says that such good general reputation may be sufficient to create a reasonable doubt of guilt, although no such doubt would have existed but for such good general reputation.

DEFENDANTS' PROPOSED INSTRUCTION NO. 26

Evidence of good character is evidence relevant to the question of guilty or not guilty, and is to be considered by you in connection with the other facts and circumstances in the case. One object in laying it be-

fore the jury is to induce the jury to believe from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution and in this connection you must take it into consideration.

DEFENDANTS' PROPOSED INSTRUCTION NO. 27

Evidence of a witness that he had known the defendants prior to the time the charge was made against them and was acquainted in the neighborhood in which the defendants lived, and that he had never heard anything said against them is evidence tending to show and prove that their characters were good at said time in said neighborhood.

DEFENDANTS' PROPOSED INSTRUCTIONS NO. 28

The court instructs you that your personal opinions as to the facts not proven cannot properly be considered as the basis of your verdict. You may believe as men that certain facts exist, but, as jurors, you can only act upon evidence introduced upon the trial, and from that, and that only, you must form your verdict.

DEFENDANTS' PROPOSED INSTRUCTION NO. 29.

You are instructed that the evidence in this case is insufficient as a matter of law to warrant or sustain

a conviction of the defendants Proffitt and Hill herein on the first count of the indictment herein and you are therefore advised to return a verdict finding them not guilty thereon.

DEFENDANTS' PROPOSED INSTRUCTION NO. 30.

You are instructed that the evidence in this case is insufficient as a matter of law to warrant or sustain a conviction of the defendants Proffitt and Hill herein on the second count of the indictment herein, and you are therefore advised to return a verdict finding them not guilty thereon.

DEFENDANTS' PROPOSED INSTRUCTION NO. 31

You are instructed that the evidence in this case is insufficient as a matter of law to warrant or sustain a conviction of the defendants Proffitt and Hill herein on the third count of the indictment herein, and you are therefore advised to return a verdict finding them not guilty thereon.

DEFENDANTS' PROPOSED INSTRUCTION NO. 32.

You are instructed that the evidence in this case is insufficient as a matter of law to warrant or sustain a conviction of the defendants Proffitt and Hill herein on the fourth count of the indictment herein, and you are therefore advised to return a verdict finding them not guilty thereon.

DEFENDANTS' PROPOSED INSTRUCTION NO. 33

You are instructed that the evidence in this case is insufficient as a matter of law to warrant or sustain a conviction of the defendants Proffitt and Hill, and you are therefore advised to return a verdict finding them not guilty thereon.

[Endorsed]: FILED JUN 3 1919 *Chas. N. Williams, Clerk* Ernest J.Morgan, *Deputy*

AT A STATED TERM, to-wit: The January A. D., 1919 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Thursday the 4th day of June, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,	)	
Plaintiff,	)	
vs	)	No. 1721 Crim.
Howard J. Proffitt, et al.	)	
Defendant.	)	

This cause coming on at this time for further trial before the Court and a jury heretofore impanelled,

all parties being present as before and the Court having announced the jury as present and all being present, the trial hereof is proceeded with.

Robert E. Magee being duly called and sworn testifies on behalf of the defendant as a character witness.

Wm. E. Hill, Defendant, being recalled resumes the stand and testifies further.

In connection with the testimony plaintiff at this time offers in evidence the following named exhibits which were admitted and ordered filed, to-wit:
Plaintiff's "Exs. 5, 5-A, 5-B, 5-C, and 5-D" being five Postal Money Order Receipts Nos. 69866, 7, 8, 9 and 70;

Defendant rests.

Now, at the hour of 11:27 o'clock A.M., the court having given the jury the usual admonition a recess is taken until the hour of 11:37 o'clock A.M. Now, at the hour of 11:37 o'clock A.M., court having reconvened and all being present as before the trial hereof is proceeded with.

Nellie I. Holmes and Eva F. Ammons each being duly called and sworn testify in rebuttal on behalf of the plaintiff.

Now, at the hour of 12:20 o'clock P.M. the Court duly admonished the jury and a recess is taken until the hour of 2:00 o'clock P.M., until which time the said jurors are excused; Now, at the hour of 2:00 o'clock P.M., court having reconvened and all being present the trial hereof is proceeded with.

Defendant's witness Roy B. Holmes is recalled by plaintiff for re-direct examination.

Plaintiff's witness Eva F. Ammons resumes the stand and testifies in rebuttal.

Arthur J. Flavern, Jessie Flavern, Frank Mitchell, May Mitchell and Mrs. Rose Erl at this time came into Court and were identified by the witness Eva F. Ammons.

C. C. Hill here came into court and was identified by witness Eva F. Ammons.

Mrs. J. C. Gaines, here came into court and was identified by the witness Eva F. Ammons

Defendant's witness U. S. McIntosh recalled by plaintiff and testifies in re-direct examination.

M. A. Ammons and Mrs. W. E. Hill each being duly called and sworn testify in rebuttal on behalf of the plaintiff.

Defendant's witness Edward L. Menier is recalled by the plaintiff in rebuttal.

Now, at the hour of 3:50 o'clock P.M., after duly admonishing the jury, a recess is taken by the Court until the hour of 3:57 o'clock P.M. Now, at the hour of 3:57 o'clock P.M. court having reconvened and all being present, the trial hereof is proceeded with.

Defendant's witnesses Arthur J. Flavern, Jessie Flavern, Frank D. Mitchell, May Mitchell, Rose Erl, C. C. King, Mrs. Roll King, Mrs. Alice Hill Stice, and Mrs. Phoebe King each being duly called and sworn testify in rebuttal.

Defendant's witness Howard J. Proffitt is recalled and testifies in rebuttal.

Mrs. Laura Gaines, Miss Margaret Hill and Mrs. Frances Cuthbert each being duly called and sworn testify on behalf of the defendants, in rebuttal.

At this time defendant offers in evidence the following named exhibit which was admitted and read into the record but not filed, to-wit:

Defendant's "Ex. I" A note of Mrs. Ida Hill to Mrs. Frances Cuthbert for $200.00;

Clarence C. Hill being duly called and sworn testifies on behalf of the defendants in rebuttal;

William E. Hill, defendant's witness, being recalled, testifies in rebuttal on behalf of the defendants.

Now, at the hour of 5:00 o'clock P.M., the Court having given the jury the usual admonition, this cause is by the Court continued to Thursday, the 5th day of June, 1919 at the hour of 9:00 o'clock A.M., for further trial before the Court and jury until which time the jurors herein are excused.

AT A STATED TERM, to-wit: The January A. D., 1919 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Thursday the 5th day of June, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,	)	
Plaintiff,	)	
vs	)	No. 1721 Crim.
Howard J. Proffitt, et al.	)	
Defendants.	)	

This cause coming on at this time for further trial before the Court and a jury heretofore impanelled, all parties being present as before and the Court having announced the jury as present and all being present, the trial hereof is proceeded with.

Wm. F. Palmer, Esq., presents the opening argument on behalf of the plaintiff followed by Milton E. Cohen, Esq., and Frank E. Dominguez, Esq., for the defendants.

Now, at the hour of 11:25 A.M., after duly admonishing the jury a recess is taken until the hour of 11:35 o'clock A.M. Now, at the hour of 11:35 o'clock A.M., court having reconvened and all being present as before the trial hereof is proceeded with.

Gordon Lawson, Esq., counsel for the plaintiff, presents the closing argument to the Court and jury.

Now, at the hour of 12:26 o'clock P.M., the Court gives the usual admonition to the jury and a recess is taken until the hour of 1:30 o'clock P.M., until which time said jurors are excused.

Now, at the hour of 1:30 o'clock P.M., Court having reconvened and all being present as before and the Court having announced the jurors as present and

all being present the trial hereof is proceeded with. The Court instructs the jury and at this time a deputy United States Marshal, having been sworn as bailiff to take charge of the jury, the jury retired in charge of its sworn bailiff to consider its verdict at the hour of 1:55 o'clock P.M.

Now, at the hour of 3:47 o'clock P.M., the jurors having returned into open court in charge of their sworn bailiff, and the roll of the jury having been called and all being present, the jurors having been asked if they have agreed upon a verdict, and having, through their foreman, replied that they have so agreed, and upon being required to present their verdict, same is now presented, read by the Clerk, and ordered filed herein, said verdict being in words and figures as follows, to-wit

"IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

United States of America,	)	
Plaintiff,	)	
vs	)	No. 1721 Crim.
Howard J. Proffitt and William E. Hill,	)	
Defendants.	)	

We, the Jury in the above-*eitlted* cause find the defendant, HOWARD J. PROFFITT, Guilty as charged in the First Count of the Indictment, and

Guilty as charged in the Second Count of the Indictment, and Guilty as charged in the Third Count of the Indictment, and Guilty as charged in the Fourth Count of the Indictment;

And, we, the Jury in the above entitled cause find the defendant, WILLIAM E. HILL, Guilty as charged in the First Count of the Indictment, and Guilty as charged in the Second Count of *of* the Indictment, and Guilty as charged in the Third Count of the Indictment, and Guilty as charged in the Fourth Count of the Indictment.

Los Angeles, California, June 5th, 1919.

G. H. Welch

FOREMAN."

It is thereupon by the COURT ORDERED that the jurors herein be and they hereby are discharged with the thanks of the Court, and excused from further service until Tuesday, the 10th day of June, 1919, at the hour of ten o'clock A.M.

It is further ordered that this cause be continued to Monday, the 16th day of June, 1919 for the imposing of sentence upon the said defendants and for any motion or motions that may be made by counsel for the defendants. It is further ORDERED that bail be fixed in the amount of $5000.00 for each of the defendants, they to stand committed to the Los Angeles County Jail until such bonds are furnished.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

United States of America, Plaintiff,	)	
	)	
Vs.	)	
	)	No.1721 Crim.
Howard J. Proffitt and William E. Hill,	)	
	)	
Defendants.	)	

We, the Jury in the above-entitled cause find the defendant, HOWARD J. PROFFITT, ———— Guilty as charged in the First Count of the Indictment, and ———— Guilty as charged in the Second Count of the Indictment, and ———— Guilty as charged in the Third Count of the Indictment, and ———— Guilty as charged in the Fourth Count of the Indictment;

And, we, the Jury in the above-entitled cause find the defendant, WILLIAM E. HILL, ———— Guilty as charged in the First Count of the Indictment, and ————Guilty as charged in the Second Count of the Indictment, and ———— Guilty as charged in the Third Count of the Indictment, and ———— Guilty as charged in the Fourth Count of the Indictment.

Los Angeles,California, June 5th, 1919.

G. H. Welch
FOREMAN.

[Endorsed]: 1721 Crim. U.S. v. Proffitt et al FILED JUN 5 1919 *Chas. N. Williams, Clerk* Ernest J.Morgan *Deputy* Verdict

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A conspiracy is a combination between two or more persons to do a criminal or unlawful act, or a lawful act by criminal or unlawful means.

From this definition of conspiracy it follows, of course, that there can be no conspiracy where one individual acts by and for himself only.

A mere mental purpose cannot justify a conviction of conspiracy. A common design is of the essence of the charge.

A person, therefore, in order to become a party to a conspiracy, must combine with someone else to effect the object of the conspiracy by the means agreed upon.

Any one who, after a conspiracy is formed, and who knows of its existence and objects, joins therein, becomes as much a party thereto, from that time, as if he had originally conspired.

To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful

end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy.

The evidence in proof of the conspiracy may be, and from the nature of the case generally will be, circumstantial.

Where circumstantial evidence is relied upon to establish the conspiracy, or any other fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or other fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion.

If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted.

You will be called upon to consider, among others, the following questions:

Was there a conspiracy as charged in the indictment, for the objects or either of them therein alleged?

Did either of the defendants, after the formation of the conspiracy, if such were formed, commit the overt acts, or any of them, as alleged in the indictment?

If the evidence satisfies you beyond a reasonable doubt, of the existence of said conspiracy, and that any of said overt acts were committed by the defendants as alleged in the indictment, and that the defendants were parties to said conspiracy when said overt

acts were committed, you will find them guilty as charged in the indictment.

If, however, the evidence fails to so satisfy you of the existence of said conspiracy, or of the commission of either of said overt acts as alleged in the indictment, you will find the defendants not guilty.

The statute of the United States makes it unlawful for any person to fraudulently or knowingly transport, conceal, receive, buy, sell, or in any manner facilitate the transportation, concealment and sale of opium, preparation or derivative thereof, after importation, knowing the same to have been imported contrary to law; and the law provides that on and after July 1, 1913, all smoking opium, or opium prepared for smoking, found within the United States shall be presumed to have been imported after the 1st day of April, 1909, after which date all such importation was prohibited, and the burden of proof shall be on the accused in whose possession such opium may be found, to rebut such presumption. The law further provides that whenever, on trial for violation of this section, the defendant is shown to have, or to have had, possession of such opium, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.

When possession of the opium is shown in the defendant, by the evidence, beyond a reasonable doubt, then the law places upon him, the defendant, the burden of explaining the possession to your satisfaction.

You are not to infer from this statement that he must satisfy your minds beyond a reasonable doubt of the innocence of his possession, but the doctrine of reasonable doubt as to whether you are satisfied applies to this element of the case, as to any other element. The burden does not shift to the defendant until you are first satisfied, beyond a reasonable doubt, from the evidence, of the defendant's possession of the opium in question.

Concerning the second, third and fourth counts of the indictment, it is not necessary to show that the defendants themselves physically handled the opium, but it is necessary in this regard, before you can convict the defendants, to show that they aided, abetted, counseled, commanded, induced or procured the commission of the crime by the other defendants charged in the indictment with them. And it is sufficient if the Government does show, beyond a reasonable doubt, that they aided, abetted, counseled, commanded induced or procured the commission of the crime.

While you must follow the courts instructions as to the law of the case, you are the sole judges of the facts and the credibility of witnesses, and, if the court expresses an opinion or comments either upon the facts or credibility of witnesses, you are not bound by such opinion or comment, but should exercise your own independent judgment on such matters.

Among the circumstances to be considered by you in passing upon the credibility of witnesses are their relation to the case and its parties, their motives, their manner upon the witness stand, and the reasonable-

ness of their statements. You should also look to the interests which the witnesses have in the suit or its results. Where the witness has a direct personal interest in the result of the suit, the temptation is strong to color, pervert or withhold the facts. The law permits the defendants, at their own request, to testify in their own behalf. The defendants here have availed themselves of this privilege and their testimony is to be treated like the testimony of any other witness, That is, it is for you to say, remembering their testimony, their cross-examination, their demeanor and attitude on the witness stand and during the trial, and everything else in the case, whether or not they told the truth. The deep personal interest which they may have in the result of the suit should be considered by the jury in weighing their evidence and in determining how far or to what extent, if at all, it is worthy of credit.

If any of the witnesses are shown knowingly to have testified falsely on this trial, touching material matters here involved, the jury are at liberty to reject the whole or any part of their testimony.

Any extrajudicial admission of defendants ought to be received and considered with caution, as well as any oral admission made by either party, for the reason that oral statements may be misunderstood.

The government has introduced as a witness one Edmondson and Lee Tong, who, according to their own testimony, were active participants in the crime charged against these defendants, or, in other words, accomplices. There are certain rules of law applicable

to the testimony of accomplices, which it is proper for the court to give you in charge, and, in doing this, I shall adopt language which has heretofore received judicial sanction.

An accomplice is a person who, knowingly and voluntarily, and with common intent with the principal offender, unites in the commission of an offense. Whether the testimony of an accomplice be true or false, is a question which, like all controverted questions of fact, is submitted solely to your determination. It is not within the province of the court to pass upon controverted questions of fact, or upon questions affecting the credibility of witnesses. But it is the duty of the court to call your attention to certain rules which obtain in courts of justice in reference to these persons known in law as "accomplices". On this point you are instructed that a particeps criminis,—that is, an accomplice,—notwithstanding the turpitude of his conduct, is not on that account an incompetent witness. It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the government has a right to use him as a witness. It is the duty of the Court to admit his testimony, and that of the jury to consider it. The testimony of an accomplice is, however, always to be received with caution, and weighed and scrutinized with great care by the jury; and it is usual for courts to instruct juries,—and you are instructed in this case,—that you may disregard the evidence of an accomplice unless he is confirmed and corroborated in some material parts of his evidence connecting the defendants

with the crime, by unimpeachable testimony. But you are not to understand by this that he is to be believed only in such parts as are thus confirmed, which would be virtually to exclude him, inasmuch as the confirmatory evidence proves, of itself, those parts to which it applies. If he is confirmed in material parts connecting the defendants on trial with the offenses charged in the indictment, he may be credited in others; and the jury will decide how far they will believe a witness from the confirmation he receives by other evidence; from the nature, probability, and consistency of his story; from his manner of delivering it, and the ordinary circumstances which impress the mind with its truth.

If you should believe from the evidence that any witness who was called by the defendants and testified in their behalf was an accomplice in the commission of the crime or crimes charged in the indictment, then the same rules I have stated to you as being applicable to such witnesses called for the Government are alike applicable to such witnesses called for the defense.

An alibi simply means that the accused was at another place at the time it is sought to prove that he was at a certain place. Now, in this case, there is evidence tending to show that each of the defendants on February 9, 1919, was present at a place in Pasadena. The defendants have sought to show by evidence that they were not at that place on that date. So far as that matter is concerned, the defendants are not required to prove that they were not there beyond a reasonable doubt or even by a preponderance of the

evidence. If in your opinion it becomes necessary for the Government to establish that the defendants were in Pasadena at the time these witnesses testified to, then that must be shown by the Government beyond a reasonable doubt. And if the evidence of an alibi raises in your minds a reasonable doubt as to their presence at that time and place, the alibi on that occasion would be established.

You should also understand that you have a right to convict the defendants or either of them of the offenses charged in the indictment although you may not believe beyond a reasonable doubt that they were in Pasadena on February 9th, provided, you are satisfied from all the evidence introduced in the case that they are guilty as charged in the indictment, notwithstanding you may have such reasonable doubt as to their having been in Pasadena at said time.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye-witness to the commission of the crime; the other is testimony in proof of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendants, and which is known as circumstantial evidence.

Such evidence may consist of admissions by the defendants, plans laid for the commission of the crime; in short, any acts, declarations or circumstances admitted in evidence tending to connect the defendants with the commission of the crime.

Where the evidence is entirely circumstantial, yet is not only consistent with the guilt of the defendants, but inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict.

Witnesses have testified as to the good character of the defendants. On this subject the court charges you that the good character of a person accused of a crime, when proven, is itself a fact in the case; it must be considered in connection with all the other facts and circumstances adduced in evidence on the trial, and if, after such consideration, the jury are not satisfied, beyond a reasonable doubt, of the defendants' guilt, they should acquit them. If, however, they are so satisfied from all the evidence in the case, that the defendants are guilty, they should convict them, notwithstanding proof of good character.

Neither the finding of an indictment, nor any allegation thereof, raises any presumption whatever of the defendant's guilt, but the burden of proof is upon the Government. The law presumes the defendants innocent until proven guilty beyond a reasonable doubt, and this rule applies to every material element of the offense charged.

A reasonable doubt is a doubt which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendants' guilt, you have a reasonable doubt, But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendants' guilt, such as

you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

By such reasonable doubt, you are not to understand that all doubt is to be excluded. It is impossible, in the determination of these questions, to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and to justify a conviction the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt.

When, weighing all the evidence, you have an abiding conviction and belief that the defendants are guilty, it is your duty to convict and no sympathy justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of evidence or facts.

This case, like all cases triable in a court of justice, should be determined by a jury upon the evidence before them, and upon that alone, subject to the rules of law laid down for your guidance by the court, and no juror acting conscientiously can base his verdict upon any other consideration.

Juries are empaneled for the purpose of agreeing upon a verdict, if they can conscientiously do so. It is true that each juror must decide the matter for himself, yet he should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to sacrifice his views or opinions of the case when convinced that they are erroneous, even though in so doing he defer to the views or opinions of others.

[Endorsed]: 1721 Crim. U.S. v. Proffitt et al FILED JUN 5 1919 *Chas. N. Williams, Clerk* ErnestJ.Morgan *Deputy* Courts' Instructions to Judge

AT A STATED TERM, to-wit: The January A. D., 1919 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday the 17th day of June, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs	)	No. 1721 Crim.
	)	
Howard J. Proffitt, et al.	)	
	)	
Defendants.	)	

This cause coming on at this time for the hearing of Defendant Proffitt's motion in arrest of Judgment, Defendant Proffitt's motion for a new trial and for the imposing of sentence upon defendants Proffitt and Hill; Gordon Lawson, Esq., and Wm. F. *Plamer,* Esq., Assistant U. S. Attorneys, counsel for the plaintiff, the defendant Howard J. Proffitt on bond and the defendant Wm. E. Hill in the custody of the U. S. Marshal together with their counsel Frank E. Domin-

guez, Esq., and Milton E. Cohen, Esq., present in open Court.

Edward de St. Maurice, an official shorthand reporter of the testimony and proceedings present and acting as such.

Milton E. Cohen, Esq., Gordon Lawson, Esq., and Frank E. Dominguez, Esq., each respectively present oral argument to the Court upon the said motions, whereupon it is by the Court ORDERED that said motions be and the same are hereby denied and the exceptions of counsel for the defendants thereto noted.

The Court thereupon proceeds to pronounce sentence upon the said defendants for the crime of which they now stand convicted, viz: the crime of the Violation of Section 37 F. P. C. conspiracy to violate the Act of January 17, 1914, and the violation of the Act of January 17, 1914. Smuggling smoking opium.

The judgment of the Court is that the defendant Howard J. Proffitt be imprisoned in the United States Penitentiary at McNeil Island, Washington for the term and period of two (2) years on the first count of the indictment and for the term and period of two (2) years and pay into the United States of America a fine in the amount of fifty (50) dollars on the second count of the indictment, said terms to run concurrently; that the defendant be imprisoned for the term and period of two (2) years on the third count of the indictment and pay a fine unto the United States of America in the amount of fifty (50) Dollars and be imprisoned for the term and period of two (2) years on the fourth count of the indictment and pay unto

the United States of America a fine in the amount of Fifty (50) Dollars and to run concurrently, said terms of imprisonment imposed on the third and fourth counts to start to run at the expiration of the *the* term imposed in the first count.

The judgment of the Court is that the defendant William E. Hill be imprisoned in the United States Penitentiary at McNeil Island, Washington for the term and period of two (2) years on the first count of the indictment; for the term and period of two (2) years and pay unto the United States a fine in the amount of Fifty ($50) Dollars on the second count of the indictment, said term to commence at the expiration of the term imposed on the first count; for the term and period of two (2) years and pay unto the United States of America a fine in the amount of Fifty ($50) Dollars on the third count of the indictment, said term to commence to run at the expiration of the term imposed on the second count; for the term and period of one (1) year and pay unto the United States of America a fine in the amount of Fifty ($50) Dollars on the fourth count of the Indictment, said term to commence to run at the expiration of the term imposed on the third count.

IN THE DISTRICT COURT OF THE UNITED STATES, WITHIN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff,	)	
vs	)	No. 1721 Crim.
Howard J. Proffitt, et al, Defendants	)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court, within and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the JUDGMENT entered in the above entitled cause, and I do further certify that the papers hereto annexed constitute the JUDGMENT ROLL in said action.

ATTEST my hand and the official seal of said District Court, this 21st day of June, A.D., 1919.

CHAS. N. WILLIAMS, Clerk,

(Seal) By Maury Curtis

Deputy.

[Endorsed]: *No.* 1721 Crim In the District Court OF THE UNITED STATES FOR THE Southern District of California Southern Division United States of America, Plaintiff, *vs.* Howard J. Proffitt, et al. Defendants. JUDGMENT ROLL as to Howard J. Proffitt & WM. E. Hill *Filed* June 21-1919 Chas. N. Williams *Clerk By* Maury Curtis *Deputy Clerk* Recorded Minute Book No. 34 page 122

AT A STATED TERM, to-wit: The January A.D., 1919 Term of the District Court of the

United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 23rd day of June, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable OSCAR A. TRIPPETT, District Judge.

United States of America,	)	
Plaintiff,	)	
vs	)	No. 1721 Crim.
Howard J. Proffitt, et al.	)	
Defendant.	)	

This cause coming on at this time for the imposing of sentence upon the defendants Wm. Frank Edmonson and Lee Tong, alias Hom Hong; Gordon Lawson, Esq., Assistant U. S. Attorney, counsel for the plaintiff, both defendants present in open court on bail and R. Kittrelle, Esq., counsel for Lee Tong, present

It is by the Court ordered that the imposing of sentence upon the defendant Wm. Frank Edmonson be and the same hereby is continued to Tuesday, the 24th day of June, 1919 at the hour of ten o'clock A. M.

The Court proceeds to pronounce sentence upon the defendant Hom Hong for the crime of which he now stands convicted, viz: the crime of the violation of Sec. 37 F.P.C. conspiracy to violate the Act of Jan.

17, 1914, violation of the act of Jan. 17, 1914. Smuggling smoking opium.

The judgment of the Court is that the defendant Lee Tong, alias Hom Hong pay a fine unto the United States of America in the amount of One Hundred ($100) Dollars and to stand committed to the Los Angeles County Jail until said fine is paid.

IN THE DISTRICT COURT OF THE UNITED STATES, WITHIN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 1721 Crim.
Howard J. Proffitt, et al. Defendant.	)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court, within and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the JUDGMENT entered in the above entitled cause; and I do further certify that the papers hereto annexed constitute the JUDGMENT ROLL in said action.

ATTEST my hand and the official seal of said District Court, this 26th day of June, A. D., 1919.

CHAS. N. WILLIAMS, Clerk,

(Seal) By Ernest J. Morgan

Deputy.

[Endorsed]: *No.* 1721 Crim In the District Court OF THE UNITED STATES FOR THE Southern District of California Southern Division United States of America, Plff. *vs.* Howard J. Proffitt, et al. Defts. JUDGMENT ROLL as to Defendant Lee Tong. *Filed* 26th June 1919 Chas. N. Williams *Clerk By* Ernest J.Morgan *Deputy Clerk* Recorded Minute Book No. 34 page 148

AT A STATED TERM, to-wit: The January A. D., 1918 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 30th day of June in the year of our Lord, One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable OSCAR A. TRIPPET, District Judge.

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs	)	No. 1721 Crim.
	)	
Howard J. Proffitt, et al.	)	
	)	
Defendant.	)	

This cause coming on at this time for the imposing of sentence upon the defendant Wm. F. Edmonson; Gordon Lawson, Esq., Assistant U. S. Attorney, coun-

sel for the plaintiff, the defendant and his counsel Claude Morton, Esq., present in open Court.

Counsel for the defendant makes a statement on behalf of the defendant and asks the Court for such *lieniency* as the Court may see fit to grant.

Gordon Lawson, Esq., Assistant U. S. Attorney and Frank E. Johnson, Esq., of the Department of Justice each make a statement to the Court.

The defendant at this time through counsel asks permission of the Court to change his plea of Guilty heretofore entered as to the Second Count of the Indictment, and it is at this time by the Court ordered that the plea of Not Guilty now interposed by the defendant as to the second count of the indictment be and the same is hereby entered of record.

The Court thereupon proceeds to pronounce sentence upon the defendant for the crime of which he now stands convicted, viz: the crime of the violation of Section 37 F.P.C. Conspiracy to violate the act of Jan. 17, 1914. Violation Act Jan. 17, 1914, Smuggling smoking opium.

The judgment of the Court is that the defendant WILLIAM FRANK EDMONSON be committed to the Los Angeles County Jail for the term and period of six (6) months on the first count of the indictment; to pay unto the United States of America a fine in the amount of Fifty Dollars ($50) and to be imprisoned for the term and period of six (6) months on the third count of the Indictment and to pay a fine in the amount of Fifty Dollars ($50) and to be imprisoned for the term and period of six (6) months on the

fourth count of the Indictment, the terms of imprisonment on the third and fourth counts to run concurrently with the term of imprisonment on the first count. The defendant to stand committed until the fines are paid.

IN THE DISTRICT COURT OF THE UNITED STATES, WITHIN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 1721 Crim.
Howard J. Proffitt, et al. Defendant.	)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court, within and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the JUDGMENT entered in the above entitled cause, and I do further certify that the papers hereto annexed constitute the JUDGMENT ROLL in said action.

ATTEST my hand and the official seal of said District Court, this 2nd day of July A. D., 1919.

(Seal) CHAS. N. WILLIAMS, Clerk,
By Ernest J.Morgan
Deputy.

[Endorsed]: *No.* 1721 Crim In the District Court OF THE UNITED STATES FOR THE Southern District of California SOUTHERN DIVISION United States of America, Plaintiff, *vs.* Howard J. *Proffitte,* et al Defendants. JUDGMENT ROLL as to Wm. F. Edmonson *Filed* 2nd July, 1919 Chas. N. Williams *Clerk By* Ernest J.Morgan *Deputy Clerk* Recorded Minute Book No. 34 page 169

AT A STATED TERM, to-wit: The July A. D., 1919 Term of the District Court of the United States, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 28 day of July, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

PRESENT:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

United States of America, Plaintiff,	)	
vs	)	No. 1721 Crim.
Howard J. Proffitt, et al., Defendant.	)	

On the motion of T. F. Green, Esq., Assistant U. S. Attorney counsel for the plaintiff and upon the authority of the Attorney General, it is by the Court

ordered that this cause be dismissed against defendant William Frank Edmonson as to Count 2 of the indictment herein and that said cause be dismissed against Lee Tong, alias Hom Hong as to counts 2, 3 and 4 of said indictment.

IN THE DISTRICT COURT OF THE UNITED STATES, WITHIN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff,	)	
vs	)	No. 1721 Crim.
Howard J. Proffitt, et al., Defendants.	)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court, within and for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of the Judgment entered in the above entitled cause, and I do further certify that the papers hereto annexed constitute the Judgment roll in said action.

ATTEST my hand and the official seal of said district Court, this 31″ day of July, A. D., 1919.

(Seal) Chas. N. Williams,
Clerk U. S. District Court,
Southern District of California.
By MauryCurtis *Deputy*.

[Endorsed]: *No.* 1721 Crim In the District Court OF THE UNITED STATES FOR THE Southern District of California Southern Division United States of America, Plff. *vs.* Howard J. Proffitt, et al. Deft. JUDGMENT ROLL as to Edmonson (2d Count) & Lee Tong as to Counts 2, 3, 4 *Filed* July 31—*1919* Chas. N. Williams *Clerk By* MauryCurtis *Deputy Clerk* Recorded Minute Book No. 34 page 281

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

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THE UNITED STATES OF AMERICA, Plaintiff,	)	No. 1721 Crim.
vs.	)	BILL OF EXCEPTIONS OF DEFENDANT, HOWARD J. PROFFITT.
HOWARD J. PROFFITT, et al., Defendants.	)	

BE IT REMEMBERED that heretofore, to wit, on the 18th day of April, 1919, the Grand Jury of the United States, in and for the Southern District of California, Southern Division, did find and return unto the above entitled Court its indictment against the defendants, HOWARD J. PROFFITT, WILLIAM E. HILL, WILLIAM FRANK EDMONSON, LEE TONG, alias HOM HONG, and JOHN DOE SMITH, alias "COCKEYE" SMITH, for violation of Section

37 of the Federal Penal Code, conspiracy to violate the Act of January 17, 1914, and violation of Act of January 17, 1914, and thereafter, on the 21st day of April, 1919, the said Howard J. Proffitt appeared in said Court and was duly arraigned upon the said indictment and entered his plea of "not guilty" thereto, and thereafter, upon the 22d day of April, 1919, the said Howard J. Proffitt filed a demurrer to said indictment, and thereafter, upon the 26th day of May, 1919, the said demurrer was duly heard by said Court, which duly and regularly made its order overruling said demurrer, to which order of the Court, then and there made, overruling the demurrer of said defendant, the said defendant took an exception, which exception was then and there duly and regularly allowed and entered by the Court.

That thereafter, upon the 27th day of April, 1919, said cause came on duly and regularly for trial, the Government being represented by Fleet W. Palmer and Gordon Lawson, Esqs., Assistant United States District Attorneys for the Southern District of California, and the defendant being represented by Frank E. Dominguez, William H. Willis and Milton M. Cohen, Esqs. Thereupon the jury to try the case was duly and regularly impaneled and the following proceedings took place on and during the trial, to wit: Opening Statement on Behalf of the Prosecution by Mr. Lawson:

MR. LAWSON: May it please the Court and you, gentlemen of the jury:

You have heard the indictment in this case read, and I take it that the purpose of this opening statement is to sketch an outline of the evidence so that you will better be able to follow the evidence as it goes in, and may consider it better and more clearly. Anything that I might say to you is not to be construed as evidence in any sense of the word. This is merely an attempt on the Government's part to assist you in getting an outline so that you might be able to better consider the evidence.

The first charge in this indictment is a charge of conspiracy to violate the opium act. That is, a conspiracy to receive, to conceal and to facilitate the transportation and concealment of opium. Under that direct charge of a conspiracy are the various overt acts that have been set out. The second, third and fourth counts of the indictment are what we term substantive offenses; that is, the direct crime, not a conspiracy.

To aid you in considering all counts together in relation to the evidence, you will observe that the overt acts set out in the first count of the indictment; that is, the conspiracy charge, are the same offenses as are set out in the subsequent counts; that is, the substantive offenses. Therefore, you may consider all the evidence in regard to the first charge together with the substantive offenses that appear in the second, third and fourth counts.

Now, the evidence that the Government will adduce here before you will show that these defendants were intimate; that they associated together. First, the Government will show the association between the de-

fendants, Hill and Proffitt. The evidence will show that the idea for committing this offense was born in the minds first of Hill and Proffitt. Then there was drawn into this conspiracy a man who is not on charge here, and who is not before you, but a man named in the indictment. We call him John Doe Smith, alias "Cockeye" Smith. He was drawn into this conspiracy by the defendants Hill and Proffitt. Then these three--Hill, Proffitt, "Cockeye" Smith--got together with another man named in the indictment, Hom Hong. First of all, there were several smaller transactions between these that I have already mentioned, particularly on two different occasions, each transaction constituting, I believe, two cans of opium. Then their acquaintance ripened and their activities increased. They laid plans on a larger scale. And the next point in the evidence will show that they were engaged in a conspiracy to violate the law in regard to about fifty 5 and 4 1/8 tael cans of opium. "Tael" is the Chinese measurement, and the words "5 tael" merely indicates the size of the can and the amount of the contents. There are two sizes--the 5 tael and the four and one-eighth tael.

They agreed in regard to this crime connected with the fifty cans of opium. That transaction was to be consummated at the City of Pasadena, and in pursuance of that conspiracy, the defendants Hill and Proffitt caused this opium to be transported to the City of Pasadena, there to be sold to Hom Hong, and "Cockeye" Smith was to arrange for this sale.

The crime is receiving, concealing and facilitating the transportation and concealment of opium. All

right. The opium was transported, the evidence will show, to the City of Pasadena. Proffitt and Hill appeared there. Hom Hong was there; "Cockeye" Smith was there. They were ready for the transaction. The money was about to pass and the opium was about to pass. The evidence will show that the defendants Hill and Proffitt appeared on the scene. The opium was seized by them, and Hom Hong forcibly disappeared from the conspiracy. We are not here concerned with that particular transaction, other than the fact that Hom Hong at this point forcibly was ejected from the conspiracy by Proffitt, Hill and "Cockeye" Smith.

The opium was then taken from the City of Pasadena to some point in the City of Los Angeles. That exact point we do not know. Then there appeared on the scene the man mentioned in this indictment -- Edmondson was taking part of this opium to Chinatown for sale.

The evidence will further show that the defendants, Hill and Proffitt, came to Edmondson and induced Edmondson to take this opium and distribute it -- to sell it, and so forth, among the various Chinese in Chinatown. And while engaged in that execution of that phase of the conspiracy, Frank Edmondson, after a chase, was apprehended, and one can of opium was found in his possession. Immediately his room was seized and opium was found there in his room, which opium had been taken to the room by the defendants Hill and Proffitt. And likewise, the evidence will show that the opium that was found in the possession of Edmondson in an automobile in Chinatown, was

(Testimony of Woo Hay.)

brought to Edmondson by the defendants Hill and Proffitt.

That in general is a sketch - - a brief outline of the evidence. But the evidence will further show after that point that the activities of Hill and Proffitt in regard to the arrest of Edmondson will clearly show the guilty knowledge that they had, and the participation that they had in this crime.

And, gentlemen of the jury, upon that evidence, which I merely named the sub-heads of, we expect at your hands a conviction.

TESTIMONY OF WOO HAY FOR THE GOVERNMENT:

WOO HAY, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 8 of Reporter's Transcript):

My name is Woo Hay. I am a paying teller at the Bank of Italy in Los Angeles. I know Hom Hong; also know him by the name of Lee Tong. He has a savings account at the Bank of Italy. On February 8th of this year he drew a check (plaintiff's Exhibit No. 1) on his savings account for $4,000, and I gave him the money in big denominations of currency. When he came to the bank to draw his money he was alone.

(Testimony of Lee Tong.)

TESTIMONY OF LEE TONG FOR THE GOVERNMENT:

LEE TONG, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 15 of Reporter's Transcript):

My name is Lee Tong and Tom Hong. I live in Los Angeles and I have been in the general merchandise business for about twenty years. I know W. E. Hill by the name of "Handsome Hill" and I have known him for several years, and I know Proffitt by the name of "Fat Policeman." Mr. Hill introduced "Cockeye" Smith to me in December of 1918, about two or three blocks away from the Plaza. He is a tall fellow and he wore eyeglasses. Hill told me he had one false eye. Hill told me "Cockeye" Smith had opium to sell to me. I went up there and saw him and he told me he would sell me the opium for $140 a can, but he cut the price to $132.50 per can and I bought two cans. I know smoking opium when I see it; it is generally put up in brass or copper cans. I saw the contents of the two cans which I bought; it was smoking opium. I smoked it. Hill brought the opium to me to my store. I gave the money to Hill. It was $265. I saw Hill after that and he telephoned me quite often. I saw him again in the Chinese year, first month eighth day. Hill telephoned me down to my store and told me to go over to Pasadena and meet him there. That was on February 8, 1919. The next time I saw "Cockeye" Smith after meeting him at the Plaza was in Pasadena, Fri-

(Testimony of Lee Tong.)

day, February 8th. Hill told Proffitt to bring "Cockeye" Smith to Pasadena to see me. I met "Cockeye" Smith in Pasadena, Chinese, first month eighth day. (The interpreter stated that that was about February 8th, but it was not very accurate). I had a conversation with "Cockeye" Smith at that time, on February 8th; it was on Friday; and he brought a couple of cans of opium down and let me sample them and he asked me $140 per can. Later on he cut the price and asked $100 for the can. "Cockeye" Smith told me he had 50 more cans of opium and was going to bring it down Sunday and sell it to me for $80 a can. He said he was going to bring it Sunday, right after that Friday, and that I was to get $4,000 from the bank and to give it to him, and I told him if it was good I would buy it and if it is no good I would not take it. I tried it on that Friday and it was opium. Hill telephoned me on Friday and said they were going to bring the opium Sunday. So I went to the bank and got $4,000 in currency, eight packages of money, $500 in a package, and then I went to Pasadena on the Sunday immediately following the Friday that I saw "Cockeye" Smith in Pasadena. I started here at half-past five and arrived there a little after six. I met "Cockeye" Smith there at eight o'clock; we met in the store of Foo Yin. There were other Chinamen present, Wong Wing, Chin Ngew, and Wong Hing. "Cockeye" Smith brought a valise with him and he said he wanted to see my money. I got the money from my pocket and showed it to him, and "Cockeye" Smith got a revolver and he pointed it

(Testimony of Lee Tong.)

at Wong Wing and Chin Ngew to frighten him. He then put the opium on the bed. He brought out of the valise seven or eight cans, copper cans. There were other cans in the bag that he did not take out. Some opium leaked out--he examined it and it was opium.

MR DOMINGUEZ: (page 26 Reporter's Transcript) I move to strike out the testimony of the witness to the effect that it was opium, on the ground that no foundation has been laid, incompetent, irrelevant and immaterial.

THE COURT: Well, this witness has already testified that he knows opium when he sees it. The objection will be overruled.

MR LAWSON: Do you want to see this first (exhibiting two cans to Mr. Dominguez)?

MR DOMINGUEZ: No.

MR LAWSON: Two cans.

THE COURT: You better take them one at a time.

Q BY MR LAWSON: Well, first one can--the larger of the two. I will ask you if that is the same kind that you saw there at that time that Sunday afternoon?

MR DOMINGUEZ: We object to that on the ground it is incompetent, irrelevant and immaterial.

THE COURT: I will sustain the objection in that form. I think you can get at it in a different way, Mr Lawson, so there will be no error.

MR LAWSON: What was your Honor's ruling?

THE COURT: I say I will sustain that objection. You asked him, the same kind.

(Testimony of Lee Tong.)

Q BY MR LAWSON: Well, have you ever seen that can before?

A Yes. They are the same company--Lai Yuen Company.

MR DOMINGUEZ: I submit, if your Honor please, that that is not responsive to the question.

THE COURT: Well, that would not make any difference. The objection will be overruled.

Q BY MR LAWSON: Now, I submit to you the smaller can of the two and ask you if the name on that is the same as the name on the cans that you saw on Sunday afternoon?

A Lai Yuen Company--same company.

MR LAWSON: We now offer them for identification, United States Exhibits 2 and 3.

MR DOMINGUEZ: We object to the introduction of those even for the purpose of identification. There is absolutely no connection shown between those cans here and any of the defendants in the case, and it is wholly immaterial.

THE COURT: Well, Mr. Dominguez, they simply want to identify these and give them a number, so that they will know that those are the cans that this witness is talking about. The objection will be overruled. Now, the larger can will be marked Exhibit 2 for Identification. It is not received in evidence. The smaller can will be marked 3 for Identification.

MR DOMINGUEZ: Will your Honor permit me now to move to strike out the testimony of this witness insofar as his testimony states that the cans that were

(Testimony of Lee Tong.)

shown him there at that time and on that bed contained opium?--shown him by "Cockeye" Smith at that time and place, on the ground that it is incompetent, irrelevant and immaterial, and upon the ground that no foundation has been laid.

MR LAWSON: It has already been ruled upon.

THE COURT: The motion will be denied.

MR DOMINGUEZ: We except.

(page 29 of Reporter's Transcript) While "Cockeye" Smith and I were in the room Hill and the fat policeman broke in the door and handcuffed me. Hill went and grabbed the money from the table inside the room. Then Hill put the opium back in the valise and the fat policeman pointed a revolver at me and took me up to the car which was in front of the Foo Yin Company. Hill brought the opium back to the car and the fat policeman, Mr. Proffitt, brought me up to the car there and then the four of us drove away from the store. Hill was the driver of the car and I sat on the side with the fat policeman, and "Cockeye" Smith on the other side in the back seat. They then drove me past a hotel and around the park and then the fat policeman asked me whether I would give up the money or wanted to go to jail. I told him that I didn't want to give up the money or go to jail, and he told me he got the opium and he swore at me and said he was going to put me in jail. I told him it belonged to Smith, it didn't belong to me. He tried to get the money out of my pocket, but he didn't do it. He took

(Testimony of Lee Tong.)

me out of the car and tried to get the money away from me, and I refused to give it up. Then Hill came over, punched me on the head and grabbed the money from me. Then Hill, Smith and Proffitt drove away in the machine, leaving me there. They took the handcuffs off me before they put me off the car. This was somewhere between Pasadena and Los Angeles. After that I took the car and went to Los Angeles. I got back that evening and told my friends about it, and they brought me up to the station to identify him. And I asked the police where Hill is, and he told me that he reported to the station about eleven o'clock; and I stayed there about ten o'clock and waited, and finally Hill came up on the street. I pointed my finger on him and he turned the corner and went back into the station--turned back right into the station.

(Page 34 of Reporter's Transcript) Q When did you see Hill again? A Three days later.

Q BY THE COURT: When was it? A About Wednesday.

Q BY MR LAWSON: About what time of day was that?

A Half-past one.

Q Where was this? A He went to my store.

Q What did he say?

MR DOMINGUEZ: Just a moment; we object to that on the ground it is incompetent, irrelevant and immaterial, calling for testimony outside of the alleged conspiracy, not tending to prove any of the overt acts mentioned in the indictment.

(Testimony of Lee Tong.)

(Page 35 of Reporter's Transcript) THE COURT: This question is addressed to what Hill said?

MR LAWSON: Yes, your Honor.

THE COURT: The objection will be overruled.

MR DOMINGUEZ: Exception.

THE COURT: Now, let's see. This occurred after the - -

MR LAWSON: After the Sunday, your Honor.

THE COURT: Yes.

(Page 36 of Reporter's Transcript) MR LAWSON: Already testified to, and on a Wednesday - -

THE COURT: Sir?

MR LAWSON: On a Wednesday after the Sunday already testified to.

THE COURT: Well, now - -

MR LAWSON: The date alleged in the conspiracy, your Honor, extends up to the time of the filing of the indictment.

THE COURT: The objection will be overruled.

MR DOMINGUEZ: Exception.

Hill told me that he heard I got a lawyer and if I didn't let up he was going to shoot me and he pointed a revolver at my brain. He told me he was going to take me to "Cockeye" Smith and get my money back for me and also get the opium.

(Page 37 of Reporter's Transcript) Q You reported the matter to the police on the Sunday night before the Wednesday, did you not?

(Testimony of Lee Tong.)

MR DOMINGUEZ: That is objected to on the ground that it is incompetent, irrelevant and immaterial, calling for hearsay, leading and suggestive.

MR LAWSON: Well, I don't see the hearsay of that, your Honor.

THE COURT: The objection will be overruled.

MR DOMINGUEZ: Exception.

MR DOMINGUEZ: Will you stipulate that the Sunday referred to was Sunday, February 9, 1919?

MR LAWSON: Yes sir.

THE COURT: That is stipulated, that that is the date that they are talking about.

MR DOMINGUEZ: Yes sir.

CROSS-EXAMINATION.

(Page 38 of Reporter's Transcript) I am known under different names. I visited in San Diego and was convicted of a felony there in 1914 under the name of Jew Ah Joe. I was also convicted of a felony under the name of Lee Ting Hing. I pleaded guilty today in this Court to the first count of this indictment. I have known Mr. Hill since he was an officer down in Chinatown, about one or two years. Mr. Hill was present at the time the doors of my place of business were broken down by the police when they were trying to find lottery tickets and gambling paraphernalia. He raided the place a couple of times but never found any lottery tickets. This was at 315 1/2 Marchessault Street. When Hill introduced me to "Cockeye" Smith there was nobody else present. On Friday, the day

(Testimony of Lee Tong.)

that Smith showed me the opium, Hill telephoned me and said he was busy and could not come to Pasadena with me, but that the fat policeman would come there, but I only met "Cockeye" Smith alone. I did not talk to Mr. Proffitt on the Friday that I saw him on the street car going to Pasadena with "Cockeye" Smith. The only time I ever talked to him was on February 9, 1919, except one time before the robbery, when he was at my store and got a drink of water. That was the end of last year. The fat policeman never talked with me about opium or never sold me any opium. In Pasadena, on February 9, 1919, I was sitting on the table in the store there and I counted eight packages of money, $4,000, and Wong Wing was there, and I had $210 besides; altogether the total amount of money was $4,210.

TESTIMONY OF WONG HING FOR THE GOVERNMENT.

WONG HING, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 76 of Reporter's Transcript):

My name is Wong Hing. I live in Los Angeles. I used to live in Pasadena. I am not doing anything now, but I was in the general merchandise business in Pasadena. I know Hom Hong--have known him for a long time. I know Hill, the defendant, as a patrolman down in Chinatown for quite a while. I know Proffitt by the name of "the fat policeman." I have seen "Cockeye" Smith in my store on Fair Oaks Street,

(Testimony of Wong Hing.)

Pasadena. The first time was on February 8th or 9th, in 1919, about six o'clock in the evening. Hom Hong was there at the time and others, Wong Wing and some visitors. Smith came in and went in the back room. They went in and closed the door. I was sitting outside. I saw Smith again on the 9th, that was on a Sunday, at the store at the same place, and Hom Hong was there at the time, also Wong Wing and Chin Ngew. That was about six o'clock. Smith had a valise along with him. They went into the back room and closed the door. I saw Hong get some money from his pocket and show it to Smith. I saw Hill and Proffitt come in shortly after Smith arrived. They broke down the door and pointed a revolver at us. This was about eight o'clock on Sunday. We ran out of the building. The fat policeman wears a cap and a kind of a police uniform and Hill wore ordinary civilian clothes. Proffitt had a short mustache and Hill had a long one, but I recognized Hill and Proffitt because they had been policemen down in Chinatown for quite a while. Then the fat policeman handcuffed Hom Hong and Hill got a valise and put it in the automobile.

CROSS-EXAMINATION.

(Page 85 of Reporter's Transcript) Proffitt wasn't a patrolman down in Chinatown. I saw Proffitt on February 9, 1919, also in the Police Station. I went up there to identify him on the night of February 9, 1919, and once before that time I saw Proffitt when he came into the store to pay us a visit and he asked

(Testimony of Wong Hing.)

us for a cup of water and we gave him a cup of water and a cigar. I never talked to "Cockeye" Smith in my life, never heard him talking, or heard anything that he said. I never went in the back room when Smith and Hom Hong were there. When Smith and Hom Hong came out of the room with Hill and Proffitt on February 9th he didn't say anything to me or didn't make any remark as to what had occurred in the room. On February 9th of 1919, in the bedroom where Smith and Hom Hong were, I peeped in the door, which was half closed, and Hom took the money and showed it to the fellow and put it back in his pocket again. I don't quite remember seeing anything else in the room at the time.

TESTIMONY OF WONG WING FOR THE GOVERNMENT:

WONG WING, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 103 of Reporter's Transcript):

My name is Wong Wing. I live in Los Angeles, but did live in Pasadena; was in partnership with Wong Hong. I know the defendant Hill by the name of "Handsome Boy." I know Proffitt by seeing him. I don't know his name. He once visited my store in Pasadena and I offered him a cigar. That was in December, 1918. I haven't seen him until the day they came and robbed us. I know "Cockeye" Smith when I see him. He is a tall fellow, very sloppy in his appearance, has a dark complexion. He wore eyeglasses.

(Testimony of Wong Wing.)

He was in my store in Pasadena on February 9, 1919--that was Sunday night; also on Friday night before that Sunday. There were other friends of mine present. On the Friday night he didn't bring anything with him. He had a conversation with Hong which I didn't hear. They had their talk in the bedroom; and then he came again on the Sunday night about eight o'clock and went in the bedroom with Hong. Smith pointed a revolver at me, and I told him that Hong doesn't speak English; that I would interpret for him. Smith had a valise. He told us to get out of the room, but I came back in the room again for my shoes and I saw seven or eight cans of opium on the bed and also Hom Hong showed Smith some money. After that Proffitt and Hill broke down the door and came into the bedroom. They pointed a revolver at us and I was frightened and ran away. I ran across the street and I saw Proffitt and Hill come out and put Smith and Hom Hong in an automobile and they drove away.

CROSS-EXAMINATION.

(Page 110 of Reporter's Transcript) I am a partner of Hom Hong. I saw Hom Hong pull out the money from inside his blouse, and then he put it back in his pocket. I saw opium spilled out of those cans on some newspaper that was put on my bed, and it leaked out and damaged the newspaper instead of my bedsheet. Proffitt had on a police uniform with big brass buttons, and also a cap and a mustache. Hill

(Testimony of Billie Wong Tong.)

had on a hat and wore a longer mustache and wore civilian clothes.

TESTIMONY OF BILLIE WONG TONG FOR THE GOVERNMENT:

BILLIE WONG TONG, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 126 of Reporter's Transcript):

My name is Billie Wong Tong. I have lived in Los Angeles since 1917. I know Hom Hong--was with him on Sunday night on February 9, 1919, and I took him up to the Police Station. That was on a Sunday night, a little after ten o'clock. I saw the defendant Hill there. He was coming down from Hill Street down towards Broadway, and towards the Police Station. Hom Hong was with me at the time. (Page 129 Reporter's Transcript).

Q What did Hill do?

MR DOMINGUEZ: That is objected to on the ground that it is incompetent, irrelevant and immaterial, calling for hearsay and after the consummation of the alleged conspiracy.

THE COURT: Objection overruled.

MR DOMINGUEZ: Exception.

Q BY MR LAWSON: Just describe now what took place while Hill was there.

(Page 130 of Reporter's Transcript) I saw Mr. Hill was making a quick turn and went right in the office where Captain Home's office is. Hom was pointing at him at the time.

(Testimony of Mrs. Teddie Neville.)

TESTIMONY OF MRS. TEDDIE NEVILLE FOR THE GOVERNMENT:

MRS. TEDDIE NEVILLE, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows: (Page 131 of Reporter's Transcript)

My name is Mrs. Neville. I know the defendant Hill and also the defendant Proffitt. Hill introduced Proffitt to me some time after the middle of January, 1919, at the Crystal Apartments, in Los Angeles. The time I met Proffitt I met another man who Hill introduced to me as a Secret Service man. He was a very large man, angular, and wore glasses. Hill introduced the other man to me.

(Page 133 of Reporter's Transcript) Q What did he say about him, if anything?

MR DOMINGUEZ: That is objected to as not in evidence that she said anything about him.

THE COURT: I overrule the objection.

MR DOMINGUEZ: Exception.

At that time he said something in regard to an eye. Hill said, "You would know he had one eye." I saw Mr. Hill the next day after this; had a conversation with him in the presence of the landlady, and the landlady asked me to keep Hill until she could get dressed and go down to the room to dinner with him, and Hill said, "I beg your pardon, I have been drinking some. I just killed a quart of whiskey with my cousin, who has returned from the service," and he

(Testimony of Mrs. Teddie Neville.)

said that Smith or "that man last night was not a government detective. He is a hop peddler" and he said, "We caught him with the goods on," and that he was the only man who ever stuck a gun in his ribs and made him hold up his hands, and he said, "We have a deal on about getting money; others get theirs and I will get mine," and he said, "I have starved my wife and baby for three years on one hundred and twenty-five dollars a month and I intend to get mine." I asked him if he wasn't ashamed to put that stuff out in the world. He said, "No, we will have it and the money both. They will not get it." He also said he was going to buy an automobile this summer.

CROSS-EXAMINATION.

(Page 137 of Reporter's Transcript) I had never heard of Proffitt or Hill before meeting them in the latter part of January, 1919. I never sent for Mr. Hill or Mr. Proffitt on that day, or this man Smith. On the day that I met Hill the landlady brought Mr. Hill to my apartment and she asked me to go to dinner with Mr. Hill. Mr. Proffitt came in a machine with the other gentleman and they came in front of my apartment. Mr. Hill took me outside and introduced me to Mr. Proffitt as his brother officer. That was on the curbstone in front of the house. I went to dinner that night with those gentlemen to the Cafe Maison Pierre. The landlady did not go. They had two women with them in the machine. I didn't know the names of the women. I was not introduced to the

(Testimony of Mrs. Teddie Neville.)

women. Prior to this occurrence, had never seen Hill in my life and had never been introduced to him nor Proffitt. One girl in the machine was much intoxicated. The men had been drinking, according to Mr. Hill's statement to me later. I didn't know these people had been drinking until I got in the machine. I didn't know that Hill was intoxicated. He was a stranger to me. He looked very good. He wasn't hog drunk. I was coaxed into going to the dinner party. My husband was not at the Crystal Apartments at the time of this party. He was in the service in Camp Lewis. After the dinner party I returned directly to the Crystal Apartments. Mr. Hill came back and the big man with the other lady. Mr. Proffitt's little girl was so drunk that she had to leave. The next afternoon when Hill came to the apartment again the landlady brought him to my apartment and asked me to entertain Mr. Hill until she could dress and go down to dinner with him. I don't remember how long he was there. I never saw Mr. Proffitt but the once. Mr. Proffitt was never in the apartment house to my knowledge and I did all my talking with Hill. Mr. Proffitt had nothing to say, never discussed at any time opium or anything like that. Mr. Smith never took any part in the conversation that I had with Hill.

(Testimony of C. A. Jones.)

TESTIMONY OF C. A. JONES FOR THE GOVERNMENT:

C. A. JONES, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 156 of Reporter's Transcript):

I am a member of the police department of the City of Los Angeles. I know the defendant Hill; I had a conversation with him about February 9, 1919, in the police detective bureau, at headquarters; there was no person present except Hill. At the time he was not under arrest. Hill at that time was a police officer. I told him at that time that I had heard what a Chinaman had told me; I told him that I had been called down to an attorney's office--Paul Schenck's office--and had been requested by Mr. Schenck to listen to the story of a Chinamman they called Hom Hong, in company with three other Chinamen, one whom I remembered as Quong, I think, or the owner of a place in Pasadena. Then I told him they had made this statement that he, or a man that they called Len Toy, or whatever name they used, that worked in Chinatown, and kept calling by the name of Hughes. And I asked him if he ever worked in Chinatown, and he said he had sometime in the past; and I told him that the Chinaman had said that they had been held up and robbed of $4,500.00, and the robbery took place through the supposed transfer of some opium. He said he knew nothing about it. I told him that I didn't come there to see him, because I didn't think it was

(Testimony of C. A. Jones.)

him that I wanted to see; but when they called the fellow "Hughes," I could not think of any name of Hughes and I thought it might be Hughson, a boy that I knew. Well, he says, "There is nothing to it, Mr. Jones, not a thing. I could prove an alibi forty miles long if necessary." And he did tell me that he was at someone's house on this Sunday evening, but whose house I don't remember, until a certain hour, and then came to work, or later in the evening came to work. And then I told him this: I said, well, the Chinaman had said that he met with a sergeant of police when he reported this matter at the station, which was about eleven o'clock P. M., and the sergeant had referred him to the chief, and I told him for that reason I didn't think I would take any active part. I said, "If you have done anything wrong, you know that and I don'.t." He said, "Positively not." Well, I think he made this statement: that he probably would see the chief himself and explain his end of it, and he also said something about Hom Hong--he would take a gun and go and kill him if he didn't lay off of it, or something like that. I forgot just how he used it, but when I told him that Hom Hong had specifically identified him, not by name other than a Chinese name, but that he knew him by sight, and had seen him standing on a Sunday evening when the Chinaman came to the station, which was about eleven o'clock, to report the matter, he told me that if Hom Hong didn't lay off of him he would just take a gun and kill him, or words to that effect.

(Testimony of C. A. Jones.)

CROSS EXAMINATION.

(Page 160 of Reporter's Transcript.) Hill told me that Hom Hong was telling a falsehood about him; in fact, he denied in general everything in connection with the matter and said that he would go and see the Chief of Police himself about the matter. I told him that I was taking no active part in the matter and had no assignment. I further told him that the man had referred the matter to the chief's office. Hill told me that he knew Hom Hong and had arrested him. He said that Hom Hong was a peddler of opium and that there might be some feeling between Hom Hong and himself; also said that Hom Hong was an old offender in selling opium.

TESTIMONY OF D. McD. JONES FOR THE GOVERNMENT

D. McD. Jones, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 165 of Reporter's Transcript):

I am a police officer in the City of Los Angeles, detailed in Chinatown. I know Frank Edmondson, and arrested him on the evening of February 21, 1919, about 6:40 P. M. The arrest was made at Wilmington and First Streets in Los Angeles. At the time Sergeant Jarvis and Officer Littlejohn accompanied me. I found one can of opium in his possession. At the time Edmondson stated that if we knew who the can of opium belonged to, it would cause a great deal of trouble; that he, Edmondson, was expecting a good

(Testimony of D. McD. Jones.)

job on Monday and that if the arrest was made he would lose it. Edmondson had a room at the Sherman Hotel, No. 312. We were there on the evening after the arrest of Frank Edmondson, the 21st of February, 1919. Sergeant Jarvis and Officer Littlejohn were present.

TESTIMONY OF GEORGE M. LITTLEJOHN FOR THE GOVERNMENT:

GEORGE M. LITTLEJOHN, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 169 of Reporter's Transcript):

I am a police officer of the City of Los Angeles. I know Frank Edmondson. I arrested him on the 21st of February, 1919, at First and Los Angeles, about 6:40 P. M. At the time of the arrest I took a can of opium, United States Exhibit No. 3, from his pocket. I put identification marks on the can myself. I saw United States Exhibit No. 2. The first time I saw it was in the defendant's room at the Sherman Hotel, Room 312. At that time Officer Jones and Sergeant Jarvis were present. Edmondson stated at that time, "You would be surprised if you knew who this belonged to." He said that the facts of the case implicated two of my brother officers. He made that statement down in the automobile at First and Los Angeles. Mr. Jones was not there at the time; neither was Sergeant Jarvis there. The two of us were alone.

(Testimony of Charles Henry Jarvis.)

TESTIMONY OF CHARLES HENRY JARVIS FOR THE GOVERNMENT:

CHARLES HENRY JARVIS, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 175 of Reporter's Transcript):

I am a police officer of the City of Los Angeles, detailed in Chinatown. I know Frank Edmondson, and was present at his arrest on the 21st of February, 1919, on First Street forty feet east of Los Angeles. Officers McD. Jones and Littlejohn were present at the time. I have seen United States Exhibit No. 3; I first saw it in Littlejohn's hands when he took it out of the pocket of Edmondson at First and Los Angeles streets. I have seen United States Exhibit No. 2. I found that in Edmondson's room in the evening a little after seven o'clock. I found that opium before Lefty James arrived at the room. There was another man that came with James; he was not an officer. He said that he had a case that he wanted Mr. Edmondson to work on. Mr. Edmondson made a statement at the time that he was arrested; he said, "Well, Sergeant, if you knew who this belonged to, you would be surprised," and I told him I didn't care who it belonged to. He said that I was doing him an awful injustice; that he was expecting a good position on Monday. I told him it didn't make any difference about that to me.

(Testimony of Charles Henry Jarvis.)

(Page 177 of Reporter's Transcript) MR. LAWSON: United States Exhibits marked 2 and 3 for identification are now offered as evidence, your Honor.

MR. DOMINGUEZ: To which we object on the ground that the same are incompetent, irrelevant and immaterial, without the issues of this case, no proper foundation having been laid.

THE COURT: The objection will be overruled.

MR. DOMINGUEZ: Exception, your Honor.

TESTIMONY OF WILLIAM FRANK EDMONDSON FOR THE GOVERNMENT:

WILLIAM FRANK EDMONDSON, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 179 of Reporter's Transcript):

My name is William Frank Edmondson. My business is that of a private detective. I have pleaded guilty to the present indictment. I first met Hill in 1917. I know Proffitt. I have known Proffitt about two years. I have seen the two cans of opium marked "United States' Exhibits Nos. 2 and 3." I saw them first when Mr. Hill brought them to my room. That was on the 16th or 17th of February. At that time he brought seven cans wrapped up in a newspaper. Before that time Hill and myself had a conversation at 16th and Figueroa on the corner, at which place Mr. Swan and Mr. Proffitt were in a machine about ten feet away. Swan is a partner of mine. Hill at that time says he had a friend in a little trouble and that

(Testimony of William Frank Edmondson.)

he wanted to help him out, and he wanted me to help him. He asked me to take seven cans of opium to Chinatown and find out if it was the real stuff or not, and then he wanted me to sell it for him. I told him I didn't know whether I could do it or not. We did not have an understanding at that time. We just talked a few minutes about it. I saw Mr. Hill the next morning and he brought the seven cans up to my room, 312 Sherman Hotel, 314 West Fourth Street, Los Angeles, and he said he had brought the stuff there, and went on to explain that he was helping a friend out of some trouble. He said he wouldn't ask me to do anything wrong, only he was helping this friend himself. No person was with Hill at the time. I got in touch with some Chinamen in Chinatown and one Chinaman came to my hotel and he offered me $90 a can for the opium. I told him that I would let him know; that I couldn't take that little money for it. I then saw Hill about three or four times and talked with him over the phone. I saw him at Solomon's dance hall and Hill wanted to know if I had any luck. He told me to do the best that I could. Then he told me to take the $180 for the two cans. I sold the opium to the Chinaman and took the money to Solomon's dance hall and gave it to Hill. He said at that time he didn't know if that money was enough to help his friend out. He said to me that there was nothing in it for me, but just helping his friend, and he appreciated it and hoped that I could be reimbursed, that he could do something for me. The next time I saw

(Testimony of William Frank Edmondson.)

Hill I was in jail. I saw Hill several times before this and we talked about opium. Hill came up to my room at different times and Proffitt came up with him. Hill was up on Wednesday night, and Proffitt stayed downstairs, I heard afterwards, but didn't see him. Hill and Proffitt came up to my room Thursday morning; it was early. They came up to take the other opium away that I couldn't sell, and said he thought he would take the stuff away, back to his friend; said I had no luck. I told him he could do whatever he felt like. He said "If you haven't any luck the next day, we will come and get it." The next day they came after the stuff and Hill said, "I guess I will take it away if you have no prospect." Then we talked about the price of it and I told him I couldn't get but $90--those fellows wouldn't pay that, and we talked a few minutes and I think Proffitt said, "Well, I hear it is selling for $120 a can in San Francisco," and I said, "You can't get it here." I took four more cans down to Chinatown and I sold three of them and the other one I had in my pocket on the way back and when Sergeant Jarvis talked to me and then took me to jail. I saw the defendant Hill when I was in jail. Hill wanted to know whether I was going to squeal about the deal. I told him I wasn't that kind, but I didn't know what kind of trouble he had got me into. I don't remember all I said.

CROSS-EXAMINATION.

(Page 200 of Reporter's Transcript) I was arrested on the 21st of February, 1919. The first time

(Testimony of William Frank Edmondson.)

that Mr. Hill ever discussed opium with me was on the 17th of February, 1919. I never had any conversation at any time or place with Mr. Proffitt about opium. The time that Mr. Hill came to my room Mr. Proffitt never said one word, except that he had heard that opium was selling for $120 a can in San Francisco. Mr. Proffitt was only in my room one time and that was on the 21st of February. I told Hill at the police station when I was arrested to get in touch with "Lefty" James, the police officer, and also my lawyer. At no time did I ever see anything that looked like opium in the possession of Mr. Proffitt and I never gave Mr. Proffitt a single penny from the sale of any opium.

TESTIMONY OF OSCAR SELLIER FOR THE GOVERNMENT:

OSCAR SELLIER, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 227 of Reporter's Transcript):

I am night watchman of the Washington Building. I saw the defendants Hill and Proffitt on the 22d day of February, 1919, in the Washington Building, between the hours of three and four in the morning. One was standing in the light and the other was standing back. Mr. Proffitt stood in front of me and they asked me to take them up to Mr. Edmondson's office in room 1106. I refused them and they told me they were police officers. Mr. Proffitt did most of the talking and I told them no, it was after hours and I

(Testimony of Oscar Sellier.)

couldn't take them up. They pulled out their badges and showed them to me. Hill said, "If you don't take me up, I will send you to jail at six o'clock in the morning." I told them that no person was in evidence in his office. I had never seen these men before.

(At this point it was stipulated and agreed by and between counsel for the Government and the defendant that the contents of the cans, and both and either of them, described as United States' Exhibits No. 2 and 3, contained opium prepared for smoking.)

TESTIMONY OF MRS. GEORGE FISHER FOR THE GOVERNMENT:

MRS. GEORGE FISHER, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 235 of Reporter's Transcript):

I live at 519 West Sixtieth Street, Los Angeles. I know the defendant Hill, but am not acquainted with defendant Proffitt. I saw Hill in the month of February, 1919, at 535 West Sixteenth Street. He came over to use our telephone during his wife's illness. At that time Mr. Proffitt called him on the telephone and a Chinaman and others, but I don't know who they were. I never listened to the conversation. I have seen Mr. Proffitt out at Mr. Hill's house when his wife was sick; I think it was the latter part of January or February. I knew the Chinaman called Mr. Hill up because Mr. Hill told me.

(Testimony of Cyrus D. Rhodes.)

TESTIMONY OF CYRUS D. RHODES FOR THE GOVERNMENT:

CYRUS D. RHODES, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 241 of Reporter's Transcript):

I am employed at the Sherman Hotel, Los Angeles. I know Frank Edmondson who lives at the Sherman. He lived there about two years. I am not acquainted with Hill. I saw the defendant Proffitt in Frank Edmondson's room, 312, at the Sherman Hotel about the 20th day of February, 1919, in the morning near seven o'clock, or a little after seven.

TESTIMONY OF JAMES A. McKAIN FOR THE GOVERNMENT:

JAMES A. McKAIN, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 243 of Reporter's Transcript):

I was hotel clerk at the Sherman Hotel from January 1st until the fore part of April, 1919. I know the defendants Hill and Proffitt by sight. I saw Proffitt in the lobby at the Sherman Hotel some time during January or February, 1919. I remember the defendant Hill more distinctly. He came in the hotel one evening with Edmondson's business partner. I never had a conversation with either of them. It was twelve o'clock at night when I saw Hill. I was running the elevator and I took him to the third floor where Mr. Edmondson's room is located. I knew that both Mr. Hill and Mr. Proffitt were officers of the law.

(Testimony of Gertrude Josephine Moran.)

TESTIMONY OF GERTRUDE JOSEPHINE MORAN FOR THE GOVERNMENT:

GERTRUDE JOSEPHINE MORAN, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 247 of Reporter's Transcript): I am employed at the Sherman Hotel, Los Angeles, as an elevator runner. I know the defendants Hill and Proffitt. I saw them in the Sherman Hotel about the 18th of February, 1919, at 6:30 in the morning. I took them up to the third floor in the elevator. They asked me if Frank Edmondson was in his room. I brought them down again about quarter past seven. When they went to the room I did not see anything in their hands.

TESTIMONY OF ETHEL A. LAIETZKY FOR THE GOVERNMENT:

ETHEL A. LAIETZKY, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 322 of Reporter's Transcript):

I live at 1127 Louida Terrace. I formerly lived at the Crystal Apartments. I have known the defendant Hill for almost a year. That was the last place I saw him. That was some time the first of January or the middle of January to the first of February. I knew that Mrs. Neville had been out to dinner with him. I had a conversation with him at that time. He told me he couldn't live on $100 a month; his family had been sick, his expenses were high. I asked him who this man Smith was and he said he was a man he had

(Testimony of Ethel A. Laietzky.)

arrested some time previously for having opium in his possession, and that he had $500 on him at the time and that he had split the $500 with he and Proffitt. He told me he knew where there was a suitcase with $10,000 worth of opium in it. I asked him if he realized what he was doing and how hard it would be for his family if he would get into trouble. I asked him what he meant by telling Mrs. Neville about opium that he was going to sell, but he didn't give me any answer as to what he was going to do at all about that. I told him what Mrs. Neville had told me, that he was going to sell the opium and that they were going to split the money four ways, they were going to get $4300 for the opium. He didn't say anything about it at all. He didn't give me any answer when I asked him about it. Hill introduced "Cockeye" Smith to me, "My partner, Mr. Proffitt."

"Cockeye" Smith was a tall, slender man, very well dressed and wore glasses, and there was something wrong with one of his eyes. I told Hill to take Smith out of the house; he didn't look good to me. I didn't think he was the right kind of a man. Mr. Hill introduced Smith to me as Mr. Proffitt, but the defendant here is not the man who was introduced to me at the apartment as Mr. Proffitt.

CROSS-EXAMINATION.

(Page 328 of Reporter's Transcript) I only saw Mr. Hill three times in my life. I know Mrs. Neville. She came to my house, the Crystal Apartments, she

(Testimony of Ethel A. Laietzky.)

told me from Seattle. She had been a manicurist before she was married but she did not work when she was at my house. I introduced her to Mr. Hill some time in January. I introduced him to her in my apartment, Room 106. He did not say at that time that he was drinking or state in the presence of Mrs. Neville that Smith was not a Government detective, but that he was a hop peddler. I never took Hill to the door of Mrs. Neville's apartment. Mr. Hill had not been drinking so that you could notice it. Mr. Hill never drank in my presence. Mr. Smith or Mr. Hill never discussed opium selling at the time I introduced Hill to Mrs. Neville. I never met Mr. Proffitt in my apartment or in the Crystal Apartments or anywhere. I never saw the gentleman, never spoke to him. I never heard any conversation at all in front of Mrs. Neville when I was talking to Hill.

TESTIMONY OF MRS. EVA B. AMMONS FOR THE GOVERNMENT:

MRS. EVA B. AMMONS, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (Page 1000 of Reporter's Transcript):

I am the mother-in-law of Mr. Hill, the defendant in this case. I did not see Mr. Hill on February 9th. At eleven o'clock Sunday morning he left our house. I didn't see him any more that day. We lived at 4226 South Grand Avenue, Los Angeles. Hill was not present any time after eleven o'clock on that Sunday, February 9, 1919. I saw him Saturday evening before,

(Testimony of Mrs. Eva B. Ammons.)

about 7:30 o'clock. At that time he rang the door bell and I went to the door. He was masked. He was disguised. He wanted to speak to my husband. He says, "I want to see Mr. Ammons." And I just stepped back in the room. I didn't recognize him; and I stepped back in the room and I says, "Papa, there is some gentleman wants to see you." And papa got up and went to the door, and he says--he didn't recognize Will at first, but I stood back, and directly they both laughed, and papa, he laughed. He said, "Will," he says, "what are you doing fixed up like that?" And he went on to explain, and told him; and papa told him after he come in the room (page 1002 of Reporter's Transcript) that he would have to put on a different disguise to fool people like that. He says, "Will," he says, "you couldn't fool me." And he went on to ask him why he was disguised, and he said him and Howard Proffitt was going to Pasadena tomorrow night at eight o'clock to a masquerade ball to catch some fellow there, to do detective work; and we told him after he come in the dining room that he would have to put on something else to disguise his self more than that. And we even told him if he would take off his little billy-goat whiskers that it wouldn't give him away half as bad, and it disgusted Will, and I don't know whether he done away with his billy-goat whiskers or not.

That was on Saturday night, February 8, 1919. After that he came back the next morning about nine o'clock. That was on Monday morning. He came in

(Testimony of Mrs. Eva B. Ammons.)

and talked to me and his wife. He pulled out a roll of money from his pocket, wrapped in a cloth, and he handed it to me and he said, "No, there is a thousand dollars; put it away." He said, "You know that Nancy is here with you sick." Nancy is his wife. He said, "I am not at home, only coming and going, and there are many burglars around." I asked him why he didn't take it and put it in the bank. He said he didn't want to. My husband asked him to put it in the bank. My husband said, "Will, I will take it and put it in my name," but he wouldn't let him do it. Well, I kept the money two or three days. Then he came and took it away from me. He took it home and put it in his clock on the mantle. Then he brought it back again and gave it to me again. This was about two or three days after. I kept it two days. Then he came back and got it the last time. Then my daughter had it and brought it and gave it to my husband and told him to keep it until Mr. Hill asked for it.

CROSS EXAMINATION.

(Page 1005 of Reporter's Transcript).

I was forcibly ejected from Mr. Hill's home. He used very violent language towards me and he ordered me never to appear in his house again. He said I told lies about him and that I was constantly nagging and abusing him, and told me that I must refrain from doing all those things. He told me to keep away from his house.

On a subsequent occasion when my daughter was sick, I went to his house. That was in the month of

(Testimony of Mrs. Eva B. Ammons.)

January. I went, however, to Hill's house on the 11th of January, 1919, when my daughter was sick. Hill was also sick. He was in bed. We made up.

I never saw Mr. Flavin to my recollection in my life. (Mr. Flavin produced in court). No, sir, I don't know anybody by that name.

I know Mrs. Mitchell who lives in Lankershim, and I know her husband. I met them twice. I remember making a visit out at Lankershim where I met Mr. Mitchell and Mrs. Mitchell on the 20th of April, 1919. Will, his wife, my husband and myself went out there in Mr. Hill's car.

On the 10th of February, 1919, Hill gave me a little white cloth rolled up and he told me, "Here is a thousand dollars." The cloth was wrapped up in a piece of paper. It was about five inches long. There was another little bundle underneath that one, like silver money tied up. It was all in a white cloth, but the greenbacks, or whatever it was in there, paper money, I suppose, was in a roll and then underneath here there was another little bundle tied with a white cloth, and the weight of it felt like it was silver money. I did not open the package. I never saw the contents of it; never took any of the money out for my own use; didn't see the silver money in the package. I gave the package back to Hill. When I had the package I put it in the closet in a sofa pillow. Nobody saw me do that. I was all alone. I didn't show the package to a soul. I only took Hill's word for it that the package contained money.

(Testimony of Mrs. Eva B. Ammons.)

Our house was a little four-room flat. My husband was working at the time. He wasn't there. That was in the morning between eight and nine o'clock, Monday morning. I never showed the package to my husband nor my daughter.

Now that I see them, I am acquainted with Mr. Flavin, Mrs. Flavin, Mrs. Rose Earl, and Mrs. Mitchell. I have met them all. Mr. Hill introduced me to them. I met these people at Lankershim about four o'clock in the afternoon of April 20, 1919. Mr. Hill and his wife and Mr. Ammons were in the same automobile with me when I met these people.

TESTIMONY OF MILLARD A. AMMONS FOR THE GOVERNMENT:

MILLARD A. AMMONS, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 1037 of Reporter's Transcript):

I am the father-in-law of the defendant Hill in this case. I saw Hill on February 9, 1919, between eight and eleven o'clock in the morning, at my house at 4226 South Grand Avenue. He stayed there until about eleven o'clock. I did not see him any time after that. It was the next day or the day after that that I saw him again. I had no conversation with him. (Page 1039 of Reporter's Transcript).

Q Did you ever talk to the defendant Hill at any time after February 9, 1919?

A Oh, yes, I talked to him, you might say every day around my house; talked to him off and on.

(Testimony of Millard A. Ammons.)

Q What were you talking about?

MR. DOMINGUEZ: That is objected to unless the proper foundation is laid.

THE COURT: The testimony now must be rebuttal testimony (page 1040 of Reporter's Transcript) or impeachment testimony of Hill. And you have got necessarily to draw the witness's attention to the particular thing that you want him to testify about.

Q BY MR LAWSON: Now, did you ever have any money that belonged to the defendant Hill?

MR. DOMINGUEZ: That is objected to on the ground that it is not rebuttal, incompetent, irrelevant and immaterial.

THE COURT: Overruled.

MR. DOMINGUEZ: Exception.

(This witness corroborates the testimony of Eva B. Ammons, in regard to the money that the defendant William E. Hill left at the Ammons home, and also in regard to the appearance of the defendant William E. Hill at the said Ammons home on the night of Saturday, February 8, 1919, in disguise, and his statement of the proposed visit to Pasadena on February 9, 1919.

TESTIMONY OF MRS. W. E. HILL FOR THE GOVERNMENT:

MRS. W. E. HILL, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows (page 1059 of Reporter's Transcript):

(Testimony of Mrs. W. E. Hill.)

I am the wife of the defendant William E. Hill. I live at 4238 South Grand Avenue, Los Angeles, with my parents. I have talked about the facts of this case with my husband, the defendant. I talked to him before February 9, 1919, and after February 9th. He told me he was going to Pasadena. He said he was going there to a masquerade ball and he said he was going there to arrest a fellow, and then on February 8th he came to my father's house and tried to disguise himself to my father. He said he was going over to Pasadena with Mr. Proffitt, the defendant in this case.

I don't know Roy Holmes, and the only time I discussed Roy Holmes with my husband was when I was sick. Two of my dish towels were missing and I asked my husband about them and he said, "They are down to Roy Holmes' garage." He said, "I took them down there to make up." They were dish towels. He said that they were for his make-up and for the make-up of Mr. Proffitt. He said that they were going down there to fix up for the masquerade ball at Roy Holmes' garage.

CROSS-EXAMINATION.

(Page 1065 of Reporter's Transcript) I am now suing my husband for divorce.

TESTIMONY OF ROY B. HOLMES FOR THE DEFENSE.

ROY B. HOLMES, called as a witness on behalf of the defendants, being first duly sworn, testified as follows (Page 263 of Reporter's Transcript):

(Testimony of Roy B. Holmes.)

My name is Roy B. Holmes. My business is at 1350 South Bonnie Brae, City of Los Angeles. On February 9, 1919, I lived with my wife and family at 1138 West 53d Street. I have an automobile machine shop. I am acquainted with the defendant Proffit. I have known him for about ten months. I remember having done work on Mr. Proffitt's car in the month of February. I remember a Sunday early in February when he was there at my place of business with Officers Burgess and Ingraham. That was, I believe, February 8th or 9th. It was on Sunday, Sunday the 8th. My shop records show that.

Q BY MR DOMINGUEZ: Now, so that the jury will get the exact date and time, please look at the shop records.

MR LAWSON: Just a minute, though, before you do that. Did you make those records yourself?

A I made the original records, yes sir.

Q Just point out which ones you made, in your own handwriting.

A I made this shop record right here (indicating).

Q Referring to that card? A Yes.

Q Is that the only one you made? A Yes sir.

Q BY MR DOMINGUEZ: Now, what does that show with reference to February 9, 1919, if anything?

MR PALMER: We object to that, as to what that shows.

MR DOMINGUEZ: I will withdraw the question.

Q Does that refresh your recollection as to the day on which you did that work for Mr. Proffitt?

(Testimony of Roy B. Holmes.)

A The record was written out on Sunday, February 8th, I think it was.

(Page 267 of Reporter's Transcript) Mr. Proffitt arrived there on that Sunday at about six-thirty in the evening. I was the only one in the shop at the time that he arrived and Mr. Ingraham and Mr. Burgess came with him. They came in Mr. Proffitt's automobile. The time that Proffitt brought his car there, I inspected the car, but I refused to work on Sunday. I left there about eight o'clock or five minutes afterwards in the evening. Mr. Proffitt had gone two or three minutes before me with Mr. Ingraham and Burgess. They all went out together. From there I went home. It took me fifteen or twenty minutes to get home.

CROSS-EXAMINATION.

(Page 270 of Reporter's Transcript) I have done work on Mr. Proffitt's car on numerous occasions previous to this time. He would be in once or twice a month, sometimes three or four times a month, on small jobs. They never amounted to a great deal. About the first time I did work for Proffitt on his car was along back in August of 1918. The car that I worked on for Mr. Proffitt was a Haines automobile touring car. On the jobs that we did for Proffitt we put in valves and ground valves and relined the brakes. I guess we have done pretty near everything in the way of minor adjustments on Proffitt's car. I couldn't specify any particular time or month before this last job that I did work on Proffitt's car. It prob-

(Testimony of Roy B. Holmes.)

ably happened every month. He had an Oldsmobile besides his Haines car. That was some time last fall. I didn't do the work on his cars myself. I have a good many men there. I presume my foreman did some of it. The work on the Haines car was done on the following day, that would be Monday. The foreman told me the work was done. I presume that he did some of the work on it. I have occasion to know because I have since referred to the records on the job and there is one time slip that is signed by my foreman and another time slip that is signed by another man in the shop. I believe that Edward Menier and Al Swayne did the majority of the work on the Proffitt car. On the Sunday I arrived at my garage about five o'clock and met Proffitt there about six-thirty. Proffitt had been over to my house at ten or eleven o'clock in the morning and asked me to come out and fix his car. I told him then I would be in my shop at five-thirty, and that we would start work on the car at seven o'clock on Monday morning I noticed the time very particularly because I had an appointment to go to a picture show and it would have necessitated my getting home somewhere around seven o'clock, and I kept watching the clock and when they drove up it had started to get dark. Mr. Proffitt had a key to the shop after that night. He did not have a key before. I left the garage between 8:05 and 8:10 and went home. I arrived home about 8:30. When Proffitt arrived at the garage that night I examined his car, told him what was the matter with it, and what would be necessary

(Testimony of Roy B. Holmes.)

to repair it. He asked me if he could borrow another car and I said that I would let him have one, provided he would take care of the car in good shape and be responsible for it, and I would let him take it and I would endeavor to get this car to run.

(Page 276 of Reporter s Transcript) Q Is that the Baptieste car? A It was, sir.

(Page 277 of Reporter's Transcript) Q Now, who is Baptieste?

MR DOMINGUEZ: That is objected to as not cross-examination, as incompetent and immaterial.

MR LAWSON: I think it will be very material before we get through, your Honor.

THE COURT: I think it is material. I will overrule the objection.

A Well, I can't interpret what you mean by "who."

Q He was a negro, was he not?

A He was a negro that lived somewhere around Central Avenue and 10th or 11th Street.

Q BY MR LAWSON: Now, don't you know that Baptieste was picked up by Proffitt and Hill when he had opium in his possession; that he was taken down to the police station, and that his car was taken away from him and put in your garage?

MR DOMINGUEZ: That is objected to as incompetent, irrelevant and immaterial and not proper cross-examination, and I ascribe the question as gross misconduct on the part of the District Attorney, the question having but one purpose, and that is to preju-

(Testimony of Roy B. Holmes.)

dice this jury against the defendant Proffitt on a collateral matter.

THE COURT: The objection is sustained. I will let the prosecution prove that either of the defendants put that car in that garage.

(Page 278 of Reporter's Transcript) Q BY MR LAWSON: Well, who put the car in the garage?

A I put it there myself.

Q Where did you get it?

A I picked it up on the street. It was broken down.

Q Then what did you do with it?

A I went over on Central Avenue and took my own car over there, and towed it in.

Q On Central Avenue? A Yes sir.

Q From whom did you get the car?

A Mr. Baptieste or someone called up my office and said their car was in front of a place on Central Avenue and wouldn't run, and I says, "We will be over there as soon as we can."

Q Was Baptieste under arrest at the time?

MR DOMINGUEZ: That is objected to as incompetent, irrelevant and immaterial and not cross-examination; and I again ascribe the question of the District Attorney as gross misconduct. This question is asked solely for the purpose of influencing this jury against this defendant Proffitt.

THE COURT: I don't see the relevancy of that question. The objection is sustained.

(Testimony of Roy B. Holmes.)

(Page 283 of Reporter's Transcript) Mr. Ingraham has had a key to my garage for a long time. I have met the defendant Hill. I think he was in the place once or twice previous to February or March 8th, whatever the date may be. I think he was out there once. He came out there to borrow a shot gun or something. I employed Mr. Proffitt two or three weeks after his arrest, as a machinist's helper.

I made the record on Sunday night of the work that was ordered to be done on the Proffitt car for the following day. I take care of the money end of the department in my business. On this specific job the card was written up on Sunday and as a rule I don't write those cards. The foreman usually writes those cards. The car was in my shop from Sunday until the following Tuesday morning- -that would be February 11th. It was paid for two or three weeks, I think, after the work was done. I am not absolutely certain as to whether this was paid for two or three weeks after, or one week after. I am not certain as to when we got the money; it might have been a week. Mr. Proffitt paid for the car personally and I stamped the card. We keep that card as a record, and when the cars are not paid for, they are kept in one file, and when they are paid for we stamp our original card. I am positive that the car came into the shop on February 9th. It was the evening that these gentlemen was supposed to have committed some crime or something of that character- -

(Testimony of Roy B. Holmes.)

(Page 291 of Reporter's Transcript) MR LAWSON: Now, wait a minute; I am not asking for that. I am asking you why, if you cannot tell the definite length of time in between when the car left your shop and when the car was paid for, why it could not have been that the car came into your shop on February 16th, the following Sunday.

A Why, I had reason to be impressed, because when the car came in it was a very unusual thing to go down on a Sunday and take in- -

(Page 292 of Reporter's Transcript) Q Yes, but I am recalling to you, Mr. Holmes- -

MR DOMINGUEZ: I submit that the witness should be allowed to finish his answer.

Q BY MR LAWSON: Why could not it be the following Sunday?

MR DOMINGUEZ: I submit that the witness has a right to answer his question.

THE COURT: He can tell all the reasons he has got for saying that it was on February 9th.

MR DOMINGUEZ: Yes sir.

. . . . . .

(Page 293 of Reporter's Transcript)

MR LAWSON: Now, your Honor, we ask that this exhibit be offered in evidence- -slip of paper.

MR DOMINGUEZ: We have no objection.

THE COURT: Mark it Plaintiff's Exhibit 4, is it, Mr. Clerk?

THE CLERK: Plaintiff's Exhibit 4, your Honor.

(Testimony of Roy B. Holmes.)

Q BY MR LAWSON: Now, Mr. Holmes, I want to make this clear and give you another opportunity to think. Have you any other reason to offer why you recall it was on February 9th, other than it was a Sunday? Is that the only thing that you remember of this particular piece of work, is that it came in on a Sunday?

A Well, the fact that it was very unusual. I was in bed on a Sunday morning, and my children had just come home from Sunday school, and Mr. Proffitt drove up to my front door, and he knocked on the door, and my little girl went to the door and said there was a man there to see me; and I said to have him come in, and he came in and told me his car was running very poorly. I don't remember as he exactly stated what was the matter with it. And he requested me to go down to the shop and fix it up, that he wanted to use his car very badly; and I absolutely refused to work on a Sunday. And he made arrangements then -- he said something about he had a day off, or some of the boys had a day off, or something of that kind, and he wanted to know if he couldn't have the car taken down to the shop that night; that is, if I wouldn't go down there and open up the shop so that he could go in the shop with the car so we could get to work on it the next morning, because he thought, I presume, that it was just a mere matter of an hour or two's work on it.

Q And that all occurred on a Sunday?

A That occurred on a Sunday.

(Testimony of Roy B. Holmes.)

REDIRECT EXAMINATION.

(Page 294 of Reporter's Transcript) Q BY MR DOMINGUEZ: Now, you started to tell the jury there that you had told them it was February 9th because of the fact that you remember the arrest of Mr. Proffitt. Go ahead and tell - -

MR LAWSON: Just a minute. I object to that as improper redirect examination, your Honor. It is cross-examination of his own witness.

MR DOMINGUEZ: I beg your pardon.

(Page 295 of Reporter's Transcript) THE COURT: I was going to ask that question myself.

MR DOMINGUEZ: Yes.

MR LAWSON: I will withdraw the objection.

Q BY THE COURT: When did you first hear about Mr. Proffitt being in this trouble.

A Well, the first I remember of it was in the daily newspapers.

Q When was that?

A It was either February or March, I couldn't be sure as to the exact date.

Q When was your attention first called to this fact that he was in there on a Sunday with his automobile, after that? When did you first start to look it up?

A I believe Mr. Johnson had a man out there, and went through the records there, and I got all my records, and at his request I took those records up in his office and we went over the whole matter.

(Testimony of Roy B. Holmes.)

Q Is that the first time you attempted to fix the date that Mr. Proffitt was there with his machine?

A On that particular job, yes sir.

Q Then you hadn't your attention called to the controversy as to when it was that Mr. Proffitt was there, until you took the books up in Mr. Johnson's office? Then that was the first time that you thought to determine the date that he was there?

(Page 296 of Reporter s Transcript) A On that Sunday, yes sir.

Q And the only thing you know about it being the date of the month is the information you derived from that investigation?

A Yes sir; yes sir.

I have a bookkeeper down at my place of business. All our records are original records. They are usually made on little time slips that are fastened to our record. When a bill is paid it is stamped "Paid" right on the original entry. I showed my time slips and records to Mr. Johnson, the agent for the Government, and he took them from me. I told him that I would aid him in every manner that I could. When Mr. Saunders was out he asked me to appear and bring with me all the original records and slips, which I did. The handwriting on the time slip is made out in the handwriting of Mr. Menier. He was my foreman on February 9th. Mr. Menier is not working for me now. He started in business for himself about two blocks away from me. He left my employ some time in April. I allowed him to resign.

(Testimony of Roy B. Holmes.)

RECROSS-EXAMINATION.

(Page 310 of Reporter's Transcript) When I spoke to Proffitt on Sunday in the morning I told him I would meet him at half-past five. I told him, "I want you to be sure to be there, because I have an engagement tonight with my wife." And I had a couple of friends visiting me here from the East, and we were to go to--I think it was Grauman's picture show, and we tried to get to the show there at 7:30, and I tried to impress upon him to be there at 5:30. And I went down there; I was there about 5. And he didn't arrive, and I was very much put out because I thought it was a very big imposition all the way through. I gave him the key to the Baptieste car and the key to the garage. The reason I gave him the key to the garage was so he could bring the Baptieste car which I loaned him back and park it in the garage. My wife and I went to the picture show at 54th and Vermont. When I got home at about half-past eight my wife jumped all over me, so I said, "Well, we will go to this picture show up at the corner." So we got --I think I had a bite to eat, and we got in my car and put my car in front of this picture show and went into the picture show.

CROSS-EXAMINATION.

(Page 340 of Reporter's Transcript) I testified here last Thursday, finishing at noon, and left the Federal Building in my own car in the company of the defendant Proffitt. On Thursday night last, May 29th, I talked with Oswald Ramsey down at my shop on Bon-

(Testimony of Roy B. Holmes.)

nie Brae, between Pico and Fourteenth Street, near the corner of Fourteenth Street; I was there with my wife. I went up to the front part of the shop and talked about this case. I asked him if he had been around there, and talked about what his recollection was.

(Page 341 of Reporter's Transcript) Q Now, Mr. Holmes, on that same Thursday night, May 29th, on the way from your shop on Bonnie Brae, between Pico and Fourteenth Street, the shop being nearer the corner of Fourteenth Street, from that point on the way to your home, which is 4815 South Normandie, you had a conversation with Mrs. Nellie Holmes, did you not? A Yes sir.

Q And it related to this case? A Some of it, yes sir.

Q Now, sir, I will ask you if at that time and place and in the presence of the parties there present, if this conversation did not take place between the parties already designated, or in substance this conversation took place:

A It did, yes sir.

Q (Page 342 of Reporter's Transcript) You stated or asked Mrs. Holmes if she remembered a Sunday last February when Mr. Proffitt was at your house. And then Mrs. Holmes said, "Do you mean the Sunday that Hill and Proffitt came while I was taking Hazel to Sunday school? And then you said, "That is the Sunday that I mean, but Hill was not with Proffitt." I said, "Yes, he was. Don't you remember? You told me that that was Hill and I afterwards told you that

(Testimony of Roy B. Holmes.)

Mrs. Merry said, after I described him to her, that he was the same man who came to borrow a gun while we were at Pasadena with the Kesters. Then you said to Mrs. Holmes at that same time and place and in the presence of the parties there present, "No, Hill was not there." Then Mrs. Holmes said at that same time and place and in the presence of the parties there present, "He certainly was." And then you said, at the same time and place, "Well, if he was, I didn't know it. I certainly did not see him." And then you further said, "It will be a good thing for you to forget it, if you saw him, for Hill is trying to prove that he was sick in bed at the time that they were supposed to have held up those Chinamen." And you further said, "It may be that you will be called on to be a witness. They had me down there today, and if you are called, you just forget that you saw Hill." Now, did that conversation, or the substance of that conversation, take place at that time and in the presence of the parties already designated?

A There was part of it, yes sir.

Q Now, just state what part of that conversation took place?

A Well, as near as I can remember the majority of it--I don't remember the exact words--

Q The majority of that conversation took place?

A Yes sir.

(Page 344 of Reporter's Transcript) Well, practically everything he said there. I don't know as it was just as he read it. . . .

(Testimony of Roy B. Holmes.)

Q BY MR. LAWSON: Is the substance of everything that was related in that conversation--was that stated at the time?

A Practically so.

Q Practically so? A Yes sir.

Q Was that in regard to Hill being at your house? Was that stated at that time?

A Well, I couldn't exactly say, because I never saw Hill out there.

Q Well now, just state the conversation then that you had with Mrs. Holmes at that time.

THE COURT: In regard to Proffitt being there on that Sunday. That is what we want.

A I stated that I thought she was very much mistaken about Hill being out there because I did not see him. That is the only thing I remember in that respect.

Q BY MR. LAWSON: Didn't you tell her to forget it?

A I told her that I thought it would be a good thing for her to forget it, because I think she is mistaken now.

Q Because Hill wanted to prove an alibi -- that he was sick at the time?

A Yes, because I don't think he was there and --

Q Now, just answer the question, Read the question.

THE COURT: That is all right, Mr. Lawson. He is explaining.

(Testimony of Roy B. Holmes.)

THE WITNESS: I thought this way: It isn't very possible, I don't think, that she ever seen Hill, and it is very possible she would make a mistake in that respect; and if she would get up and make a mistake, why, she might make a misstatement.

Q And you were afraid that it would hurt the defendant Hill; is that it?

A No sir; I have absolutely no interest.

Q You have no interest? A No sir.

Q How far is it from your house to your shop?

A It is about 4.6 miles.

Q 4.6 miles? A Yes sir.

REDIRECT EXAMINATION.

(Page 346 of Reporter's Transcript) On Thursday, May 29th, I had a conversation with Mr. Ramsey in the front part of my shop. He is our night watchman. I asked him if he was on duty on this particular Sunday night. He said he was. I asked him what time he made his first call. He said he thought it was in the neighborhood of 7:30, something of the kind. I said, "Did you come in the shop?" He said, "No, I saw lights there and didn't bother you." I says, "What time did you come the next time?" He said, "It was about 7:45 or eight o'clock." And he told me where his beat went to, where he went from there, and came back. And at that time I heard someone coming up the driveway and I walked out. And he says, "Everything all right?" I says, "Yes; just some friends of mine here," and he walked away. He said he didn't see anyone there, except he saw some figures in the

(Testimony of Roy B. Holmes.)

office, figures of some people. I have already stated that those parties who were there were Mr. Ingraham and Mr. Burgess. Mrs. Holmes is my wife. The conversation between Mrs. Holmes and myself took place in my automobile going from the shop out to my house, and I think some of the conversation happened in the parlor; no one else was present at that conversation. At the time I was on the stand here Thursday I had a robbery occur at my place of business, and it was in reference to that robbery that the thing was brought about. A foreman of mine had quit, and he had been taking my men away from me in an underhanded manner, and Thursday one of these men left while I was here in the courtroom--took his tools, and in taking the tools took some fire extinguishers and some other things, and I was asking her in regard to that, because this same man has approached her on other subjects, and I was trying to find out something, because I intend to do something about it. Eddie Menier is that man's name. I asked my wife if he had come and told her any of these things, and she wouldn't state, and I asked her if she remembered this particular time that Mr. Proffitt was out to my house, and she said yes. I asked her if she remembered our going to the picture show; she said she did not remember that, and I asked her if she remembered we had an appointment with the Kesters. She said we had an appointment with the Kesters, but she said it was down at my aunt's house, and it was not to go to a picture show. And she also stated that on the Saturday night

(Testimony of Roy B. Holmes.)

previous to this, we had a house gathering and we had dancing and one thing and another, and it was, I expect, two or three o'clock in the morning when the people left. And it was the next day after that that I saw Mr. Proffitt out to my house. Sunday morning he came there before I got out of bed; I wasn't out of bed at all. And we conversed about that. I was trying to refresh her memory as to some of these details and she insisted on one thing, and I told her I thought she was mistaken. She insisted that Mr. Hill was sitting in the car outside, and I told her that I thought she was mistaken, because to my knowledge she had never seen Mr. Hill until afterwards when he came to borrow a gun. I didn't get out of bed until half an hour, I expect, after he left; I did not see his car that morning. I know Mrs. Proffitt, and have talked with her many times, I guess. I would know her if I would see her and hear her speak, but I wouldn't know her voice if she was in another room and heard her speak.

(Page 352 of Reporter's Transcript) Q Do you remember whether or not you talked to her on Saturday prior to the Sunday morning when Mr. Proffitt went to your house?

A No, I do not remember.

Q Do you remember whether or not she called you up to make an engagement with you, as to when Mr. Proffitt could see you?

MR LAWSON: Objected to, your Honor, as incompetent, irrelevant and immaterial, and hearsay. I do not see, your Honor, what possible connection any

(Testimony of Roy B. Holmes.)

statement that Mrs. Proffitt could make to this witness, would have.

MR. DOMINGUEZ: It will be brought to the attention of the defendant Proffitt, and it will be shown by other evidence that it was within his knowledge and at his request that this should be done.

THE COURT: Well, prove it by her. You can't prove it by this witness.

Q BY MR. DOMINGUEZ: Now, do you remember anything further, then, that you told Ramsey there in the place there that Thursday night, about this case, any more than you have related?

A No sir.

Q Do you remember anything more than you said to your wife about this matter, than you have already related?

A No, I do not.

THE COURT: In regard to this conversation over the phone; I may have been mistaken in my understanding about it, but what is it you are seeking to prove by this witness concerning Proffitt?

MR. DOMINGUEZ: I will prove, if your Honor please, that Mr. Proffitt got home and that he asked his wife, due to the fact that he was going right to bed, to call up Mr. Holmes. This was on Saturday--to suggest to Mr. Holmes the propriety of seeing him the following day with reference to fixing up his car; that Mrs. Proffitt did call up Mr. Holmes and that Mr. Holmes suggested to her at the time that Mr. Proffitt

(Testimony of Roy B. Holmes.)

should appear that Sunday morning, and in pursuance of that Mr. Proffitt did appear there; and, further, they agreed that he should meet him there that afternoon; brought to the attention of Proffitt, and had been at his request.

MR. LAWSON: Your Honor, I fail to see how it can be established through this witness over the telephone, that he may now relate- -

THE COURT: You can prove that Mrs. Proffitt made an engagement with this witness.

MR. DOMINGUEZ: That is what I want.

THE COURT: To be at his house on Sunday morning.

MR. DOMINGUEZ: Yes sir.

MR. PALMER: Well, he has testified that he didn't know her voice.

THE COURT: I understand that. I just want to get my ruling right, that is all.

MR. LAWSON: I will withdraw my objection.

Q BY MR. DOMINGUEZ: Well, in order to refresh your recollection on that point, don't you remember that Mrs. Proffitt called you up while you were at your garage and told you that there was some trouble with the car? This was Sunday afternoon, a little after one o'clock, and that she requested that you make some engagement with Mr. Proffitt, and that you gave her your house number where Mr. Proffitt should go to see you the following morning?

A I may have done it, but I can't remember it.

MR. DOMINGUEZ: All right, sir.

(Testimony of Roy B. Holmes.)

A I know he called me up, but I don't remember any specific time that it was done.

Q I am asking about her, whether she called you up on that Saturday, if you have any recollection of it.

A I have no distinct recollection of it, no sir.

Q Now then, with reference to taking Mr. Proffitt the other day after he left the court room, what occurred? What was there about that?

A Well, I met him outside of the building here. My car stood here on the street, and he asked me if I would go out to dinner with him. I said, "Certainly."

Q Well, did you discuss the case with him?

A No. He said it would be better if he would say absolutely nothing about the case.

Q I want to ask you if at any time or place Mr. Proffitt or Mr. Hill, or any other person, mind you, any other person, has ever suggested to you, directly or indirectly, that you should appear in this court and give any testimony that was in the slightest way false and untrue?

A No, they have not.

MR. DOMINGUEZ: I think that is all, if your Honor please.

THE COURT: All right.

RECROSS-EXAMINATION.

(Page 356, et seq., of Reporter's Transcript)

BY MR. LAWSON:

Q Now, Mr. Holmes, in regard to this conversation that occurred in the house between you and your wife, have you stated all that conversation?

(Testimony of Roy B. Holmes.)

A Sir?

Q Have you stated all that conversation?

A All that I remember, yes sir.

Q In the house?

A Yes sir.

Q I will ask you if at that time and place, and in the presence of the parties there present, namely, yourself and Mrs. Holmes, that there wasn't this following conversation: Mrs. Holmes stated to you that you were mixed up with this man Proffitt in opium deals; and she further said, "Well, I have tried to get you to stay away from them and not mix into police affairs enough, and if you had been at home when you should have been, you would not have had it to say, that is, to testify." Then you said, "I never was mixed up or had anything to do with them." And then Mrs. Holmes said to you, "You certainly did. You seem to know all about that fellow you call 'Nigger Baptieste'." And you said, "I did not." And then Mrs. Holmes said to you, "Well, I suppose you have forgotten that you told Mr. and Mrs. Schlotshauer and Mr. and Mrs. Kunkel and myself that the nigger's car that the Government was looking for at your shop, and that they were looking for it all over, and that you knew that there was opium in it, and you hadn't looked for it yet, but was pretty sure there was a secret place in the car where the stuff was hid." Then you further said, "You are driving me crazy. You always misinterpret things so." And then Mrs. Holmes said to you, "I told you that the car was in the shop, and the Govern-

(Testimony of Roy B. Holmes.)

ment had looked for it - -" No, you said that. You said this to Mrs. Holmes, "The car was in the shop, yes, and the Government had looked for it, but I never mentioned opium." Then Mrs. Holmes said to you, "You certainly did. And if they ask me to testify, I will ask Grace and Addie, and I bet they will remember it." And Mrs. Holmes further said, "What about 'Cockeye' Smith? I guess you forgot about telling me that you were going to San Diego with the sheriff to get him. And when you got back you told me that you had found him and had come back by way of Seal Beach, and had dinner there about three o'clock; and that you lied to me. You went to San Diego with a couple of women, and I suppose another man." Then you said, "I didn't." Then Mrs. Holmes said to you, "You did." Then you said, "Well, who told you, Addie?" And Mrs. Holmes said, "No, he did not, and it is none of your business who did, but I know you did." And you further said, "Well, there were two women in the crowd, but they were not with me. They were with the other fellows." Then Mrs. Holmes said to you, "I suppose you played chauffeur." Then you said, "Well, you are always picking fights with me. What have I done to bring this one on?" Then Mrs. Holmes said to you, "I am not fighting, but want you to understand that I won't lie for you or anybody else." And you said, "I don't want you to, nor nobody asked you to." Then Mrs. Holmes said, "You certainly did, just a few minutes ago. You asked me to forget that Mr. Hill was in the car with Proffitt. I

(Testimony of Roy B. Holmes.)

want you to understand that I won't lie. If I am called on to be a witness, I will tell the truth, if I can remember and be sure, and if I don't remember, I will say so." And then you said, "Well, is there anything good left of me?" Then Mrs. Holmes said, "Yes, there is. You are the best hearted fellow that ever lived," and you said, "Is that all?" Mrs. Holmes said, "When I said that, I mean the bottom of everything. If you would stay at home with your family and go out with decent people and treat my friends as you should, everything would go all right, every way. But as long as you go with a crowd like you have been, and have nothing to do with your family, you can never expect to be happy, for nobody can make you happy, me or any other woman." Then you said, "Don't worry. There will never be any other woman with me."

MR. COHEN: Read it all, Mr. Lawson.

MR. DOMINGUEZ: Yes, read it all. I think it all should have been read at one time.

MR. LAWSON: That is all right; I will read it.

Q Then you said, "I only hope that I can fix things inside of thirty days so that my children will never have to go without, and I will get out of the way. There is only one person that I know I can trust, and that is God." And your wife said, "You had better not be so sure of it, the way you have been living." Then you said, "Nellie, I had a nice surprise for you. Do you know what I am thinking of?" She said, "No." Then you said, "Are you sure?" Then Mrs. Holmes said, "Why, yes." Then you said, "Well, I don't know

(Testimony of Roy B. Holmes.)

whether to tell you or not, but I believe I will." Then you further said, "I was going to surprise you by putting you in your own home inside of three months from now. I have had a big business proposition offered me, and it is still hanging fire, but if it goes through the least that I will make the first year will be $20,000, and I am still in debt to Charlie Gorton $5,000 or $7,000. I am paying him when I can. But I was going to try to have you in your own home in about three months from now." Mrs. Holmes made no reply. You further said you had changed the combination on the safe at the shop because you could not trust Eddie Menier, your foreman, because small amounts of money had been missed, also a book of Stevens-Duryea parts, and a list of Stevens-Duryea owners, which you thought Eddie probably had taken, as he was considering going in business for himself. Then follows the jurat, subscribed and sworn to.

(Page 359 of Reporter's Transcript).

Q Now, did that conversation take place?

A It did, as near as I can remember.

Q That same conversation?

A As near as I can remember it, yes sir.

Q That has just been related to you?

(Page 360 of Reporter's Transcript)

Q In substance the same?

A Yes sir.

Q All right. Is there any material part in that statement that you want to change now?

(Testimony of Roy B. Holmes.)

A Nothing that I know of. I don't know as that is my statement.

Q Is there any part in there that you might even think immaterial that you want to change?

MR. DOMINGUEZ: Well, now, he didn't make that statement.

THE COURT: The objection will be sustained.

MR. LAWSON: That is all.

MR. DOMINGUEZ: Please let me have that so I can read parts of it.

MR. LAWSON: Oh, no.

MR. COHEN: If your Honor please, we are entitled to that statement. There are parts of that statement that are not introduced to the jury.

MR. LAWSON: As to the parts that are introduced in evidence, your Honor, we will be very glad to do it.

THE COURT: I can't make an order on them to produce that paper. Proceed, Mr. Dominguez, in redirect examination.

MR. DOMINGUEZ: We except to the ruling of the Court.

Q BY MR. DOMINGUEZ: Now, did you ever at any time ask your wife to appear in this court and tell a lie?

A Not that I ever remember, no sir.

Q Now, you ought to remember that, Mr. Holmes. Did you ever do so?

A No sir.

(Testimony of Roy B. Holmes.)

Q Did you ever tell her that you knew "Cockeye" Smith?

A No sir.

Q Did you ever tell her that you knew that there was opium in the Baptieste car?

A No sir.

Q Did you ever tell her that you had gone down to San Diego in that car--the Baptieste car?

A No sir.

Q Did you ever tell her that you had withheld information from the Government authorities that there was opium in that car?

A No sir.

Q Did you ever tell her that the car had a false bottom?

A No sir.

Q Did you ever tell her that any association that you had with any police officer or police official was corrupt?

A No sir.

Q Did you ever tell her that any of your associates with whom you were associated were corrupt or that they handled opium, or anything of that kind?

A No sir.

Q Did you ever tell her at any time or place, or anybody else, that you had been engaged in the opium traffic?

A No sir.

(Testimony of Roy B. Holmes.)

RECROSS-EXAMINATION.

(Page 363 of Reporter's Transcript)

It is not a fact that on the 9th day of February, 1919, that I arrived home about ten o'clock. It is not a fact that I arrived home nervous and frightened, and I did not pull down the shades in my house.

TESTIMONY OF MRS. NELLIE I. HOLMES FOR THE GOVERNMENT:

MRS. NELLIE I. HOLMES, called as a witness on behalf of the prosecution, being first duly sworn, testified as follows: (Page a of Reporter's Transcript)

I live at 4815 Normandie Avenue. I am the wife of Roy B. Holmes, the witness called on behalf of the defendants. At the present time am living with my husband. I recall February 9, 1919; that was on Sunday. Mr. Hill and Mr. Proffitt came to our house that day and wanted to borrow a car. That was about nine-thirty in the morning. They came in a car. I wasn't at home when they came. I just passed them on the street and they were going to the house. Mr. Holmes told me they wanted to borrow a car. On that day my husband was in bed when Mr. Proffitt came to the house and I think he stayed in bed until about eleven o'clock or twelve o'clock, and he got up and went to his shop. He said he had to work on the car so Mr. Proffitt could take it out. He then went to the shop and didn't get home until about ten minutes after ten that night and when he got home he seemed to be terribly excited.

(Testimony of Mrs. Nellie I. Holmes.)

(Page d of Reporter's Transcript) Q What did he do when he came home?

A Well, he seemed to be terribly excited and - -

MR. DOMINGUEZ: Just a moment: Now, I move to strike that out on the ground it is not responsive.

THE COURT: I think it is responsive. Go ahead.

MR. DOMINGUEZ: Exception. It is hearsay- - calling for hearsay.

MR. LAWSON: Just proceed, Mrs. Holmes.

A He came in and he pulled down all the front curtains- - something that never happens only once in six or eight years.

MR. DOMINGUEZ: Just a moment. I move to strike that out on the ground the same is incompetent, irrelevant and immaterial, without the issues of this case and not binding on either defendant, what Holmes told her.

(Page e of Reporter's Transcript) THE COURT: If I remember right, Mr. Dominguez, Mr. Holmes was asked these questions: "Weren't you excited when you got home?" and, "Didn't you go in and pull the curtains down?" and he denied it. Now, if that is so, this evidence is admissible.

MR. DOMINGUEZ: It is so, your Honor, and I beg your Honor's pardon. That is a fact, it is so.

THE COURT: The objection will be overruled. Proceed.

Q BY MR LAWSON: Just go on now, if there is anything else.

(Testimony of Mrs. Nellie I. Holmes.)

A What I mean by "six or eight years," I don't think they have ever been pulled down but twice since we are married, and that was twice since this supposed hold-up has happened.

MR. DOMINGUEZ: I move to strike out the last statement of this witness on the ground that the same is incompetent, irrelevant and immaterial, hearsay, her conclusion and opinion, and ask the Court to instruct the jury to disregard that statement.

THE COURT: Read the answer. (Answer read).

THE COURT: I will overrule the motion to strike out.

MR. DOMINGUEZ: Exception.

On the evening of February 9, 1919, I was home with the children. My sister had gone to church. I was home all day and expected Mr. Holmes to be home, of course, to dinner about six or seven o'clock and he didn't come and we waited until eight o'clock. He didn't come home until about ten minutes after ten o'clock that night and then he didn't eat any dinner. We went to bed shortly after that. We did not go out any that night; did not go to any moving picture that night. The next Sunday, February 16, 1919, I think we went to a moving picture show. Did not have any appointment to go to a moving picture show. We had no engagement with any relatives of Mr. or Mrs. Kester to go to a moving picture show on February 9th.

(Page g of Reporter's Transcript) Q Now, Mrs. Holmes-- Pardon me, your Honor, I haven't had a

(Testimony of Mrs. Nellie I. Holmes.)

chance to look at this transcript. Mrs. Holmes, did you have a conversation with Mr. Holmes on the night of Thursday, May 29th, on the way from his shop, which is on Bonnie Brae, between Pico and Fourteenth Street, the shop being near the corner of Fourteenth Street, from that point (page h of Reporter's Transcript) to your home?

A Yes sir.

Q And what parties were present at that time?

A No one.

Q Just you and Mr. Holmes?

A Yes sir.

Q Now, I will ask you, Mrs. Holmes, if this conversation did not take place, if not the exact words, in substance?

MR. DOMINGUEZ: Now, we desire to offer an objection to this question, on the ground that the same is incompetent, irrelevant and immaterial, calling for hearsay evidence outside of the presence of either one of these defendants.

MR. LAWSON: You understand, your Honor, this is impeaching testimony.

THE COURT: The question you are going to ask her now is the same question you submitted to Mr. Holmes?

MR. LAWSON: Yes, your Honor, the same question that was propounded to the witness Holmes. This is purely for the purpose of impeachment.

THE COURT: Under those circumstances, Mr. Dominguez, what objection have you got?

(Testimony of Mrs. Nellie I. Holmes.)

MR. DOMINGUEZ: None. I didn't know his explanation- -

THE COURT: All right.

MR. DOMINGUEZ: Of what he intended to do.

Q BY MR LAWSON: Mr. Holmes stated, or asked you, Mrs. Holmes, if you remembered a Sunday last February when Mr. (Page i of Reporter's Transcript) Proffitt was at your house, and if you, Mrs. Holmes said, "Do you mean the Sunday that Hill and Proffitt came while I was taking Hazel to Sunday school?" Then Mr. Holmes said, "That is the Sunday that I mean, but Hill was not with Proffitt." Then you, Mrs. Holmes, said, "Yes, he was. Don't you remember you told me that that was Hill? And I afterwards told you that Mrs. Merry said, after I described him to her, that he was the same man who came to borrow a gun while we were at Pasadena with the Kesters." Then Mr. Holmes said to you, Mrs. Holmes, "No, Hill was not there." Then you, Mrs. Holmes, said, "He certainly was." Then Mr. Holmes said, "Well, if he was, I didn't know it. I certainly did not see him." And then Mr. Holmes further said, "It will be a good thing for you to forget it if you saw him, for Hill is trying to prove that he was sick in bed at the time that they were supposed to have held up those Chinamen." And then Mr. Holmes further said, "It may be that you will be called on to be a witness. They had me down there today, and if you are called you just forget that you saw Hill."

(Testimony of Mrs. Nellie I. Holmes.)

Now, did that conversation take place between you and Mr. Holmes at that time and place?

A Yes sir.

Q. In the presence of you and Mr. Holmes?

A Yes sir.

(Page j of Reporter's Transcript) THE COURT: She stated the presence.

Q BY MR LAWSON: Now, Mrs. Holmes, on the same evening of May 29th, on Thursday night, at your home, in the City of Los Angeles, I will ask you if this conversation did not take place between you and Mr. Holmes, you two being the only parties present at that time. I might further say, did you have a conversation at that time in the house?

A Yes sir.

Q I will ask you if this is the conversation that took place at that time: You, Mrs. Holmes, stated to Mr. Holmes that "You were mixed up with this man Proffitt in opium deals." And further said, "Well, I have tried to get you to stay away from them and not mix into police affairs enough, and if you had been at home when you should have been, you would not have had it to say, that is, to testify." Then Mr. Holmes said, "I never was mixed up or had anything to do with them." Then you, Mrs. Holmes, said, "You certainly did. You seem to know all about that fellow you call Nigger Baptieste." And then Mr. Holmes said, "I did not." Then you, Mrs. Holmes, further said to him, "Well, I suppose you have forgotten that you told Mr. and Mrs. Schlotzhauer and Mr. and Mrs.

(Testimony of Mrs. Nellie I. Holmes.)

Kunkel and myself, that the Nigger's car that the Government was looking for was at your shop, and that they were looking for it all over, and (page k of Reporter's Transcript) that you knew that there was opium hid in it, and you hadn't looked for it yet, but was pretty sure there was a secret place in the car where the stuff wa*d* hid." Then Mr. Holmes said, "You are driving me crazy; you always misinterpret things so." And then Mr. Holmes said this to you, "I told you that the car was in the shop and the Government had looked for it." Then Mr. Holmes said this to you: "The car was in the shop, yes, and the Government had looked for it, but I never mentioned opium." Then you said to Mr. Holmes, "You certainly did; and if they ask me to testify, I will ask Grace and Addie, and I bet they will remember it." And they you further said to Mr. Holmes, "What about Cockeye Smith? I guess you forget about telling me that you were going to San Diego with the sheriff to get him. And when you got back you told me that you had found him, and had come back by way of the Seal Beach, and that you had dinner there about three o'clock; and that you lied to me--you went to San Diego with a couple of women, and I suppose another man." Then Mr. Holmes said, "I didn't." Then you said, "You did." Then Mr. Holmes said, "Well, who told you? Addie?" Then you said, "No, he did not, and it is none of your business who did, but I know you did." And then Mr. Holmes further said, "Well, there were two women in the crowd, but they were not

(Testimony of Mrs. Nellie I. Holmes.)

with me; they were with the other fellows." Then you said to Mr. Holmes, "I suppose (page 1 of Reporter's Transcript) you played chauffeur." Then Mr. Holmes said, "Well, you are always picking fights with me. What have I done to bring this on?" Then you said to Mr. Holmes, "I am not fighting, but want you to understand that I won't lie for you or anybody else." Then Mr. Holmes said, "I don't want you to, nor nobody asked you to." Then you said to Mr. Holmes, "You certainly did just a few minutes ago. You asked me to forget that Mr. Hill was in the car with Mr. Proffitt. I want you to understand that I won't lie. If I am called on to be a witness I will tell the truth if I can remember and be sure, and if I don't remember, I will say so." Then Mr. Holmes said, "Well, is there anything good left of me?" And you said to Mr. Holmes, "Yes, there is. You are the best hearted fellow that ever lived." And Mr. Holmes said, "Is that all.?" Then you said, "When I said that, I mean the bottom of everything. If you would stay at home with your family and go out with decent people and treat my friends as you should, everything would go all right every way; but as long as you go with a crowd like you have been, and have nothing to do with your family, you can never expect to be happy, for nobody can make you happy, me or any other woman." Then Mr. Holmes said, "Don't worry, there will never be any other woman with me." Then Mr. Holmes said, "I only hope that I can fix things inside of thirty days so that my children will never have to

(Testimony of Mrs. Nellie I. Holmes.)

go without, and I will get out of the way. There is only (page m of Reporter's Transcript) one person that I know I can trust, and that is God." And then you said, "You had better not be so sure of it, the way you have been living." Then Mr. Holmes said, "Nellie, I had a nice surprise for you. Do you know what I am thinking of?" Then you said, "No." Then Mr. Holmes said, "Are you sure?" Then you said, "Why, yes." Then Mr. Holmes said, "Well, I don't know whether to tell you or not, but I believe I will." Then Mr. Holmes further said, "I was going to surprise you by putting you in your own home inside of three months from now. I have had a big business proposition offered me, and it is still hanging fire, but if it goes through the least that I will make the first year will be $20,000, and I am still in debt to Charlie Gorton five thousand or seven thousand dollars. I am paying him when I can. And I was going to try to have you in your own home in about three months from now." Then Mr. Holmes further said that he had changed the combination on the safe at the shop, because he couldn't trust Eddie Menier, his foreman, because small amounts of money had been missed, and also a book of Stevens-Duryea parts and a list of Stevens-Duryea owners which he thought Eddie probably had taken, as he was considering going into business for himself.

NOW, did that conversation take place at that time?

A Yes sir.

MR. DOMINGUEZ: Just a moment. To which we object on the (page n of Reporter's Transcript)

(Testimony of Mrs. Nellie I. Holmes.)

ground that the same is incompetent, irrelevant and immaterial, calling for hearsay, not tending to prove or disprove any issues in this case, the question asked, and the statement made being purely on collateral matters, and not impeaching or tending to impeach the witness Holmes in any matter to which he testified in this case, bearing upon the issues in the case.

THE COURT: Now, if Mr. Holmes had this conversation with this witness, he was interesting himself in the trial of this case, and I think for that reason it is relevant, if that is your only objection.

MR. DOMINGUEZ: All the objections that I made, if your Honor please, are in the record. It is incompetent, irrelevant and immaterial and calls for hearsay.

THE COURT: The objection will be overruled.

MR. DOMINGUEZ: Yes sir. Exception.

THE COURT: What is your answer?

THE WITNESS: Yes sir.

MR. DOMINGUEZ: May I at this time, with your Honor's permission, object to your Honor's statement that the witness Holmes had an interest in this case?

THE COURT: No, I did not say that.

MR. DOMINGUEZ: Well, pardon me.

THE COURT: I said if he stated these things to this witness, it will show that he had interested himself.

MR. DOMINGUEZ: Pardon me, then, if your Honor please. (Page o of Reporter's Transcript).

(Testimony of Mrs. Nellie I. Holmes.)

THE COURT: That he had interested himself in this case.

MR. LAWSON: You may cross-examine.

CROSS-EXAMINATION.

I never spoke to either Mr. Proffitt or Mr. Hill except to say "Good morning" to them.

TESTIMONY OF P. H. BURGESS FOR THE DEFENSE:

P. H. BURGESS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows (page 364 of the Reporter's Transcript):

I have been a police officer for ten years. Have lived in the City of Los Angeles for about twelve years. I have known Mr. Roy Holmes, a witness in this case, probably a year; also have known Mr. Proffitt for about three years. I saw Mr. Holmes and Mr. Proffitt about six-thirty on the 9th day of February, 1919, at Mr. Holmes' garage. I was in company with Detective Ingraham. Proffitt arrived there in his machine. I came in Ingraham's machine. I heard Proffitt speak to Holmes about fixing his, Proffitt's, machine. Most of the time I was sitting in the office. Proffitt, Ingraham and myself left about eight o'clock. We took Proffitt home in our car and let him off at 22d and Magnolia Street. While in the garage Holmes made a remark that he had a date with his wife to go to a picture show about eight o'clock. When we left, Proffitt's car was left at the garage.

(Testimony of P. H. Burgess.)

CROSS EXAMINATION.

(Page 368 of Reporter's Transcript) I saw Proffitt on the 3d day of February, 1919, when I asked him to make an arrest for me. I can't say positively whether I saw him between the 3d and the 9th of February. I usually see him if he gets through before going off duty. I work out of the same detective's office that Proffitt does. At six o'clock Sunday, February 9, 1919, was the first time that I saw Ingraham on that day. We stayed probably an hour and a half at the Holmes garage. It was getting dark at the time we left. Ingraham, Proffitt and Holmes were talking about the machine when we got there. I didn't engage very much in the conversation. I had been to the Holmes garage twice before this time but not on Sunday. I talked with Proffitt a few days after his arrest about this case. It was after he got out of jail. He asked me if I remembered when I was over at the garage and what occurred there. I talked to him about the case several times. I remembered that this time was February 9th, because it was one of my days off and the fact of Mr. Ingraham's illness, and the fact that he and I were detailed together on the first of February would recall the date.

TESTIMONY OF GEORGE K. HOME FOR THE DEFENSE:

GEORGE K. HOME, called as a witness on behalf of the defendants, being first duly sworn, testified as follows (page 381 of Reporter's Transcript):

(Testimony of George K. Home.)

I am Captain of Detectives, Los Angeles Police Department. I have known Howard Proffitt for three or four years. His reputation for truth, veracity, honesty and integrity has been good up to the time of his arrest, which was February 24, 1919.

TESTIMONY OF MRS. CLAUDIA R. PROFFITT FOR THE DEFENSE:

MRS. CLAUDIA R. PROFFITT, called as a witness on behalf of the defendants, being first duly sworn, testified as follows (page 385 of Reporter's Transcript):

I am the wife of Howard Proffitt. We have two children. In February, 1919, we were living at 2122 Magnolia Avenue. I remember the Sunday night prior to February 12, 1919. That was the 9th. My husband worked from eleven o'clock P. M. until eight A. M. I saw my *hysband* in the morning of February 9th at our house. It was about a quarter after nine in the morning. He came home. I was in bed, and he says, "I am going over to Mr. Roy Holmes." I had a conversation with Roy Holmes on February 8th about one o'clock P. M. My husband was in bed asleep. My husband had gone to bed at 11:30. He told me to try to get Mr. Holmes and tell him that my husband wanted to see him about putting his machine in for repairs and ask him whether it would be all right to come out to the house in the morning, which would be Sunday morning. It was after one o'clock on Saturday that I talked to Mr. Holmes. I talked to him

(Testimony of Mrs. Claudia R. Proffitt.)

over the telephone at his garage. Mr. Holmes said it would be all right. I told that to my husband when he wakened on Saturday night. On Sunday morning my husband left the house with his car between 9:15 and 9:30; he told me he was going over to Mr. Holmes'. My husband returned about 10:30; he told me he was going to take the machine down to the Holmes garage that night, which was February 9th, and then went to bed and awakened about 5:30; he left the house about six o'clock by himself. He was away until about twenty or twenty-five minutes after eight.

CROSS EXAMINATION.

(Page 397 of Reporter's Transcript) Mr. Proffitt arrived home on February 9th around the hour of nine-fifteen. He usually gets home about eight-thirty. He left there shortly after nine-fifteen, between nine-fifteen and nine-thirty for the Holmes garage, and he got back about ten-thirty. He got up and dressed about five-thirty. He didn't have dinner with me on that night, because he went to the garage. He got back about twenty minutes after eight.

I know the defendant Hill. I have been out to his home. I was there the first part of March. I was there just once; that was on Saturday, February 15th. His wife and baby and Mr. Proffitt and myself were there. I was over at the Hill home on the 13th of January, when Mrs. Hill was sick with the influenza. My husband was in the room at the time.

(Testimony of U. L. McIntosh.)

TESTIMONY OF U. L. McINTOSH FOR THE DEFENSE:

U. L. McINTOSH, called as a witness on behalf of the defendants, being first duly sworn, testified as follows (Page 410 of Reporter's Transcript):

I am a police officer. I have lived in Los Angeles for eighteen years. I know the defendant Hill. Hill was detailed in the detective department from eleven o'clock at night until eight o'clock in the morning. He was working under my specific direction on the first day of February, 1919. My work sheets show that on January 11, 1919, he was sick. The records show that between the 11th of January, 1919, and the 27th of January *and the 27th of January* Mr. Hill was sick in bed and at home.

CROSS EXAMINATION.

(Page 414 of Reporter's Transcript) The defendant Hill went to work on February 9, 1919, at 10:45 P. M.

TESTIMONY OF BEULAH PORTER HILL FOR THE DEFENSE:

BEULAH PORTER HILL, called as a witness on behalf of the defendants, being first duly sworn, testified as follows (page 416 of Reporter's Transcript):

I live at 1409 Oak Grove Avenue, Los Angeles. I am a teacher and I do nurse work. I know the defendant Hill. I have known him since last January.

(Testimony of Beulah Porter Hill.)

I also know his wife. I attended Mrs. Hill as a nurse on the 9th day of January when they were living on 60th Street. I attended Mr. Hill on the 9th of January when they were living on 60th Street. I attended Mr. Hill on the 9th day of January, the following day after I commenced to attend Mrs. Hill. Dr. Squires was the attending physician. Mr. Hill's physical condition was delirious. He had fever and was in bed. I remained there as nurse until the 14th day of January. He was in bed at that time. His wife was very sick during that time. On the 14th day of January he was not very ill. I was in constant attendance.

CROSS EXAMINATION.

(Page 420 of Reporter's Transcript) Mr. Hill told me that I had been subpoenaed to come here and if I was not, not to come. I received my subpoena yesterday. Mr. Hill was out of bed before I left nursing them. He was up the day I left.

TESTIMONY OF DR. C. G. STADFIELD FOR THE DEFENSE:

DR. C. G. STADFIELD, called as a witness on behalf of the defendants, being first duly sworn, testified as follows (page 423 of Reporter's Transcript):

I am a physician and surgeon at the Receiving Hospital in Los Angeles City. I know the defendant Hill. I attended him in January some time, the 13th or 14th. Saw him at his home. He was confined to his house but wasn't in bed. He was treated by me

(Testimony of Dr. C. G. Stadfield.)

approximately thirteen days. The last time I saw him was about on the 26th. He was sick enough for me to tell him to stay in the house and when I called at the house he was there.

TESTIMONY OF DR. JULIUS F. ROTH FOR THE DEFENSE:

DR. JULIUS F. ROTH, called as a witness on behalf of the defendants, being first duly sworn, testified as follows (Page 428 of Reporter's Transcript):

I am a physician and surgeon and have been so for twenty-eight years. I know the defendant William Hill - - have known him since November, 1918. I attended him professionally from November 18th to December 19th. Also attended him once in January. He had the flu.

CROSS EXAMINATION.

(Page 430 of Reporter's Transcript) I attended him at my office from November 20th to December 19, 1918.

TESTIMONY OF DR. HAMILTON FORLINE FOR THE DEFENSE:

DR. HAMILTON FORLINE, called as a witness on behalf of the defendants, being first duly sworn, testified as follows: (Page 432 of Reporter's Transcript):

I am a physician and surgeon. I know the defendant Hill, attended his wife in January, 1919, I think about

(Testimony of Dr. Hamilton Forline.)

the 12th or 13th. Mr. Hill was there at the time. He was in bed. I had occasion to visit the house frequently after that up to about the 22d or 23d of January. I had occasion to send a nurse, a Miss Hiller, there.

TESTIMONY OF EDWARD L. MENIER FOR THE DEFENSE:

EDWARD L. MENIER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows (Page 436 of Reporter's Transcript):

I live at 621 West 30th Street. Have lived in this city twelve years. My business is automobile repairing. In the month of February, 1919, I was employed by Roy B. Holmes Company, at 1350 South Bonnie Brae. The work slips which you now show me are in my handwriting and are signed by me, being numbered 2434 and marked "Defendants' Exhibit A." The work referred to on the work slips was work done on the car of Howard Proffitt; it was a Haines car. The work in question was done on February 10, 1919. I think I recollect of it being Monday. It was work done on Proffitt's car on February 11th. It was the same car that we worked on on February 10th, as evidenced by Defendants' Exhibit B. It was also work done on Howard Proffitt's car by us. Work slip signed by me and marked "Defendants' Exhibit C." On the work slip Number 2434 that is signed A. W. Saline, also an employee of Roy Holmes; that is his

(Testimony of Edward L. Menier.)

handwriting. That slip shows that work was done on the Proffitt car on February 10th. It was work done on the Proffitt car on February 10th, as shown by this work slip and marked "Defendants' Exhibit E." There was another work slip which has no date except the month of February concerning work done on the Proffitt car, which work slip is Defendants' Exhibit F. There was work done later in the month of February, on the Proffitt car, as per this work slip which you now hand me, marked "Defendafts' Exhibit G."

CROSS EXAMINATION.

(Page 447 of Reporter's Transcript)

BY MR. LAWSON: Q Now, Mr. Menier, did you ever have any conversations with the defendant Proffitt when he brought his car to the shop to be repaired?

MR. DOMINGUEZ: Well, we object to that, unless it is limited to the times indicated by this witness's testimony, as not cross-examination; and on the further ground that this witness has not testified that Howard Proffitt ever took that car to that garage or that shop.

MR. LAWSON: Well, your Honor, I think it is material to show that all the transactions that this witness had with the defendant Proffitt, if he had any transactions - - this counsel here has gone into part of it, and it seems to me that the Government is entitled to go into all the conversations that they had, if they did have them.

(Testimony of Edward L. Menier.)

THE COURT: Regarding the time that they worked on this car?

MR. LAWSON: Yes, your Honor.

THE COURT: Why, sure.

MR. LAWSON: Referring to around the times that you worked on the car.

MR. DOMINGUEZ: Well, we except to that, unless it is limited to the actual times, not about the time, but the time itself.

THE COURT: Well, any conversation that he had concerning doing this work that he has testified about.

(Page 448 of Reporter's Transcript)

MR. LAWSON: Yes sir.

MR. DOMINGUEZ: We except.

THE WITNESS: Well, there was one morning Mr. Proffitt brought the car in and Mr. Holmes wasn't there - -

MR. DOMINGUEZ: Well, we object to that, unless it bears upon the time. This witness has testified that he did work there on Monday. There is no testimony on the part of this witness that Proffitt ever took that car to him Monday morning. The witness testified that he found the car out in a garage in Hollywood. Now, he can't testify to any other Monday morning.

THE WITNESS: That was the Monday morning afterwards, after the 10th.

Q BY MR LAWSON: It was the 18th of February?

(Testimony of Edward L. Menier.)

A Yes, it would be the 18th.

Q BY THE COURT: Have you testified concerning work on the 18th?

A Only that I went out to Hollywood to get that car.

THE COURT: All right.

MR. LAWSON: He already testified to that, your Honor, I think, and the time slip shows it.

THE COURT: Proceed.

MR. DOMINGUEZ: Exception.

A One morning Mr. Proffitt brought the car in, and Mr. Holmes wasn't there. He just brought the car in, and left it, and he says, "If Mr. Holmes wants to know if that car was here when (Page 449 of Reporter's Transcript) you opened up this morning, tell him 'yes'." So I went around the shop and told the different boys to tell Mr. Holmes in case he inquired. I am not sure whether that was in the morning - -

MR. DOMINGUEZ: May I ask one question, your Honor, to clear this matter up?

THE COURT: Yes.

Q BY MR. DOMINGUEZ: Was that conversation that you are now relating, on the Tuesday or Monday morning when you got that car out there at Hollywood?

A I hadn't got far enough to state that. I don't remember the morning this happened.

MR. DOMINGUEZ: Well, then I object to it on the ground that it is incompetent, irrelevant and immaterial; no proper foundation laid.

(Testimony of Edward L. Menier.)

MR. LAWSON: Your Honor, the fact that this witness cannot recall - -

THE COURT: Now then, I understand that the witness is going to testify about some conversation that he had concerning the time that some of these slips relate to, is that it?

THE WITNESS: No, it isn't exactly that. The time that he brought the car in, I don't remember the date of that, but I do remember what was done on the car on the different dates.

Q BY THE COURT: Well, haven't you already testified to what was done on the car?

(Page 450 of Reporter's Transcript)

A Yes sir.

THE COURT: The objection will be overruled.

MR. DOMINGUEZ: Exception.

THE COURT: Go ahead and state it, now.

Q BY MR LAWSON: Go ahead and state that conversation.

THE COURT: About Mr. Proffitt bringing the car in.

MR. LAWSON: Yes.

A Well, he brought the car in and he told me, if Mr. Holmes inquired about the car, to state that it was there all night. So I went around and told the different boys to that effect, but I don't remember the exact date of this morning, but I do remember on the morning of the 10th of doing a little light work on the car, such as I changed the oil in the crank case, I believe, and I adjusted the cups, and went over the

(Testimony of Edward L. Menier.)

carbureter, and I took the car and tested it, and if I remember right, Mr. Proffitt got the car that afternoon and brought it back the next morning. And the next morning I tore down the front end and took out the starter clutch, and previous to that time that starter clutch hadn't been taken out in our shop, and I don't remember Mr. Saline working on it.

(Page 451 of Reporter's Transcript) The work slip which you show me, dated February 10th--I did that work myself the 11th or 12th. It was after the first day the car was in, and it was taken out and it was brought back the following day. Then I tore out the starting clutch, but that man never worked on the starting clutch because I did it myself, and it never had been taken out in the shop previous to the time that I done the work. The work started in at half past seven in the morning and finished at ten o'clock. The pencil mark on that slip is written in Mr. Saline's writing. I did the work myself on the 11th or 12th. It was not done on the 10th at all, and that man never worked on the car with me. There was only one other man worked on the car with me, and that was Huntington, and he changed the tire.

(Page 454 of Reporter's Transcript) Q BY MR LAWSON: I submit some exhibits already introduced and ask you if those are not the slips indicating that work in regard to the starter clutch?

A Yes sir, this one here.

Q Which one is this?

A It is B.

(Testimony of Edward L. Menier.)

Q Defendants' Exhibit B. What does that exhibit show?

A That shows that I took off the radiator and took down the front end and took off and disassembled the starting clutch.

Q And what date was that?

A On February 11th. Started at three o'clock in the afternoon and finished at five thirty-five.

Q Now, what do those other exhibits show?

A Changed the right rear tire and - -

Q Which one is that now you are referring to?

A That one has nothing on it. That is Huntington's time. This one here.

MR. LAWSON: They are pinned together and all marked "A."

A Well, this one is not stamped.

Q It is the second one of that series?

A Yes. Changed the right rear tire and filled universal joint.

Q And the next one?

A Assembled starter clutch on the 13th of the month.

Q And who did that work?

A I did.

Q Now, was there any other on there?

A There is another one here, put in starting clutch and assembled front end, and so forth, on the 14th. The job was started on the 11th. It was disassembled and sent out to the grinders and was re-

(Testimony of Edward L. Menier.)

turned on the 13th and installed on the 14th- -assembled and installed on the 14th of February.

Q Of this year?

A Yes. The assembling of the clutch started at five o'clock on the 13th and went on until five-thirty. On the morning of the 14th, started at seven-thirty and the job was finished at nine o'clock- -this particular starter job.

Q Do you know whether or not the Baptieste car was in the shop at that time?

MR. DOMINGUEZ: That is objected to as not cross-examination, and as incompetent, irrelevant and immaterial.

THE COURT: The objection is overruled.

MR. DOMINGUEZ: Exception.

(Page 455 of Reporter's Transcript) The Baptieste car was in the shop on the 10th of February, 1919. It was in running condition.

REDIRECT EXAMINATION.

(Page 458 of Reporter's Transcript) I left the employ of Mr. Holmes about the 6th or 7th of April.

Q BY THE COURT: You say this is Mr. Saline's signature there?

A Yes sir.

Q You are familiar with it?

A Yes sir.

Q Well, is that his handwriting up there?

A Yes sir.

Q The same man wrote them both?

A Yes sir.

(Testimony of Edward L. Menier.)

Q And who wrote the number there, can you tell?

A Well, that looks like his writing.

Q All of it?

A Yes sir.

Q And that "2-1/2" in there, what is that?

A 2-1/2 hours. That is from seven-thirty to ten o'clock.

Q BY MR. DOMINGUEZ: You knew Mr. Howard Proffitt's Haines car, didn't you?

A Yes sir.

Q Is it not a fact that it was there on the morning of the 10th when you got there to work?

A I won't say that.

Q Will you say it was not there?

A No, I won't. I don't remember whether it was or not.

I know Mrs. Holmes. I saw her some time last March.

TESTIMONY OF HERBERT A. SQUIRE FOR THE DEFENSE:

HERBERT A. SQUIRE, called as a witness on behalf of the defendants, being first duly sworn, testified as follows (Page 473 of Reporter's Transcript):

I have been a physician for thirty-three years. I live at 2947 La Salle Avenue, Los Angeles, and have lived in Los Angeles fifteen years. I am acquainted with the defendant Hill. I had occasion to visit him the fore part of January. He had influenza. His wife

(Testimony of Herbert A. Squire.)

was sick at the time. He was a very sick man at that time.

TESTIMONY OF WESLEY AUSTIN FOR THE DEFENSE:

WESLEY AUSTIN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows (Page 484 of Reporter's Transcript):

I am a police officer for the City of Los Angeles; have lived in Los Angeles nine years, and have been an officer three years. I am acquainted with the defendant Proffitt. He has a drab olive uniform in my locker. There is only one key to the locker and I have the key. I never loaned the key to Mr. Proffitt. The uniform has been in my locker since March 1918. The uniform has brass buttons on it.

TESTIMONY OF HOWARD J. PROFFITT FOR THE DEFENSE.

HOWARD J. PROFFITT, called as a witness on behalf of the defendants, being first duly sworn, testified as follows (Page 489 of Reporter's Transcript):

I have lived in California for thirty years. Los Angeles has always been my home. I have been a police officer for the City of Los Angeles for over three years. I know Mr. Hill, the defendant. I first met Hill in November, 1918. We were detailed to work out of the same office. We were paired together. We were on what was known as the Flying Squadron. In the month of February, 1919, my hours of work were from

(Testimony of Howard J. Proffitt.)

eleven o'clock at night until eight o'clock the next morning.

I know Frank Edmondson. The first time I ever met Edmondson was in the latter part of November or the first of December, 1918. I remember meeting Edmondson at Sixteenth and Figueroa on February 17, 1919. Hill asked me to drive him down to Sixteenth and Figue*ora* and I told him I would, and I drove him over to Sixteenth and Figue*ora*. We were there possibly five minutes when Edmondson drove up and stopped his machine right behind ours, Edmondson and his partner Swan. At that time I didn't hear any conversation concerning opium. I never had any conversation with Hill or anyone else regarding the sale of opium or "Cockeye" Smith. I did not hear any of the conversation at that time. I never knew a person by the name of "Cockeye" Smith. I was shown a picture of a man supposed to be "Cockeye" Smith, but I never met such a man to my recollection. Neither did I ever go to dinner with such a man. I never had any opium in my possession in my whole life; neither did I ever ask any person to buy opium or sell opium for me or any person else. I never telephoned at any time to a man by the name of Hom Hong, a witness who appeared in this case. I never talked to Tom Hong in my life. The first time I ever saw him was on the night of February 24th, the time I was arrested.

I went to Edmondson's room one time. It was in the morning. At that time Hill was also present. Ed-

(Testimony of Howard J. Proffitt.)

mondson had sent for us on a matter concerning his being Chief of Police of Venice, and he wanted us to help him and in return he would let us work there as officers, doing special work. I think this was on a Monday morning. Edmondson had clippings and telegrams concerning his fitness for the job, which he showed us at the time. There was not a single word said about opium. I left there with Mr. Hill. The conversation lasted probably about fifteen minutes.

I remember taking Mr. Hill down to the Sherman Hotel one night. I did not go up to Mr. Edmondson's room. I stayed out in the machine. It was a police machine. Hill went upstairs and then came down with Swan, Edmondson's partner. After that Monday I never saw Edmondson until they took me out of the County Jail and Edmondson was going out. I believe it was on the 24th or 25th of February, this year. I never discussed with Edmondson anything concerning opium. I never told Edmondson or any person else that opium was worth $120.00 a can in San Francisco.

On February 9, 1919, that was Sunday, I spent most of my time at home. I arrived home about 8:30. I did not remain there. I went to Mr. Holmes' house. I arrived home about 10:30. I left work with Hill that morning. I went down to the Holmes house. Mr. Holmes was in bed. I told Holmes that Monday was my day off and I told him that something was wrong with my machine. I asked him if he would come down and see if he could fix it for me. He told me to take it down to the garage about 5:30 or 6 o'clock, and that

(Testimony of Howard J. Proffitt.)

he would meet me there. I then went home. My wife was at home when I arrived. I had breakfast, after which I went to bed. I got up about 5:30 and then took my machine down to the Holmes garage. I should say I arrived there about six o'clock. Just about the time I arrived there Mr. Ingraham and Mr. Burgess drove up in their car. That must have been around about 6:30. I talked to Mr. Holmes about the repairs upon my car and then I left there a little bit before eight o'clock. That was on Sunday, February 9th. I left my car there to be fixed. I went home in the Ingraham machine. Mr. Ingraham drove the car. I got off the car at 22d and Magnolia; that is the nearest corner to my house, and I went home. After I got home I lay on the lounge and went to sleep, and I left the house about ten o'clock and went to work. I reported for duty.

I did not go to Pasadena on the night of February 9, 1919, nor had I any opium of any kind in my possession on that night or any other night, nor did I witness any person put opium in any valise on that night or any other night. I did not take a ride to Pasadena on February 7, 1919.

I never visited at the Crystal Apartments in my life; neither was I ever at a cafe called the Maison Pierre in my life, nor do I know where it is.

My car is a Haines car. I took my car out of the Holmes garage about a week after. I think it was about the 17th of February.

(Testimony of Howard J. Proffitt.)

I never wore a mustache in my life; never attempted to disguise myself. I never went into Hom Hong's place in Pasadena in the uniform of a police officer, wearing brass buttons and a cap. I never saw Hill wearing a little short mustache, or any kind. I have a blue uniform with two buttons on it. I haven't seen it for a year. I am detailed out of the detective's office and never wore a blue uniform from out of there.

I never was treated or did I ever see Hom Hong, or any other Chinaman, in Pasadena, or did they ever give me a glass of water or a cigar. Was never in their place of business at Pasadena.

I never saw any opium in the possession of Mr. Hill.

I heard about Mr. Edmondson's arrest about two o'clock in the morning. Hill and I had heard that Edmondson had been arrested. Hill asked me if I would drive him out to Officer James' house; that he had seen Edmondson and Edmondson wanted him to get in touch with James and his partner, Swan, and also his attorney, Claude Morton. I told Hill I would drive him out. On our way out we stopped at the Washington Building where Edmondson has his office. We were looking for Swan. I did not talk with Edmondson at all after his arrest.

I was never detailed to work in Chinatown. The night of my arrest they took me to the detective's office and asked me if I was acquainted with Hom Hong. He was there at the time. I told them I had never seen

(Testimony of Howard J. Proffitt.)

him before. I was informed as to the charges against me. They told me that I was supposed to have been selling opium in Pasadena. I told them that I had not. This is the first time I have ever been accused of any charge, the first time I have ever been called before my superior officers and called to explain any conduct on my part.

The latter part of February I attended a banquet in Chinatown with Lieutenant McIntosh, my superior officer. There were two banquets. The banquets were given by the Hop Sing tong, a Chinese society; that was on the 2d day of February. There were between one hundred and one hundred fifty guests. There are different tongs in Chinatown.

CROSS EXAMINATION.

(Page 524 of Reporter's Transcript)

I was very busy on the night of Edmondson's arrest. I don't remember just what I was doing that night. If I could see the work sheet I could tell just exactly what calls I went on. My name would be there. I went to work that night at eleven o'clock, Edmondson had been booked at the City Jail. Every person around there had been talking about his arrest. I knew that he was in jail at the time. Hill and I were paired together that night but we didn't report together. His hours were the same as mine. The first time Hill and I talked Edmondson's arrest over was between three and four o'clock in the morning. Hill went up to see him anyway. Hill and I went out at Edmondson's request to see some friends for him.

(Testimony of Howard J. Proffitt.)

Hill told me that just after talking to Edmondson. We then went to Mr. Swan's home. We found him out. Before starting for Swan's home Hill said Swan was either up at his office or at his home. Our idea in seeing Swan and Lefty James at Edmondson's request was to see if anything could be done to help Edmondson, to get an attorney for him, and so forth. We went to the Washington Building and saw the watchman there. As I remember, we rang the elevator bell. The watchman came down. I didn't know what floor Edmondson's office was on, or anything about it. Don't know yet. Never did know. We asked the watchman about the number of Edmondson's office; talked to him just a minute; conversation was between all of us. I had no keys to Edmondson's office. I didn't ask the watchman to let us in the office but wanted to go up to find out whether Swan was there. We then went out to Lefty James' house. That was around about three or three-thirty. We were on duty at the time. I was driving a city machine. I was not ordered by my superior officer to drive out to James's residence or go around helping Edmondson, but I went on the *errends* just the same. I went down to the Sherman Hotel in the morning. I believe it was on Monday. At that time Edmondson made the remark that the Trustees of Venice met on Monday, and that was the time he showed us the telegrams and newspaper clippings about the job that Edmondson was going to get as Chief of Police. That was in February.

(Testimony of Howard J. Proffitt.)

I have talked to Edmondson six times in my whole life, but I have seen him thousands of times, but I didn't know who he was until some time in November or December, 1918. I had no particular association with him whatever; nothing in common. I came up to his hotel at eight o'clock in the morning. I had just got off work; went on the street car, to the best of my recollection; might have walked; I don't remember; from Edmondson's place went to my home. This was the only time I was ever in the Sherman Hotel to talk to Edmondson. Hill and I went together. Hill and I had both talked over this job at Venice and we went there for the purpose of seeing Edmondson's recommendations, and so forth. I had talked to Edmondson once about this job in the Police Station when he was up there.

TESTIMONY OF A. W. SALINE FOR THE DEFENSE.

A. W. SALINE, called as a witness on behalf of the defendants, being first duly sworn, testified as follows: (Page 519 of Reporter's Transcript):

I live at 1316 West 58th Street, Los Angeles. Lived in Los Angeles two and one-half years. I am an automobile mechanic by profession and in the month of February, 1919, I worked for Roy B. Holmes at 1350 South Bonnie Brae Street, Los Angeles.

Defendants' Exhibit E is in my handwriting. That is a time slip we make out on each job. That was made out in the Holmes shop. I made it out on Feb-

(Testimony of A. W. Saline.)

ruary 10, 1919, about 7:35. We have a time clock and we stamp all our work by the time clock. That shows the time I commenced to work on the car. I finished that particular job at five minutes to ten. That job is marked No. 2435. The work was done on the Howard Proffitt car. I came to work at 7:30 in the morning on February 10, 1919. When I came the Howard Proffitt car was there. I started to work on the car at 7:35.

CROSS EXAMINATION.

(Page 521a of Reporter's Transcript)

Independent of the Defendants' Exhibit E in this case, I remember doing some work on the spot light and on the starter clutch. I did that work on Monday morning. When you show me the slip I can remember it a little bit. Independently of the slip I remember working on the car that particular time. I recognize this particular car was a new car. It is not the first time the car had been in the shop, but it is a new car. I know when I went to work on it. I recall seeing the car standing there. It was standing just to the left of the door when you come in. I know right where the car was standing. I have a picture of it in my mind. When I got there that morning the shop was open. I don't know how long the shop had been open when I got there. Edward Menier, the foreman, was there when I got there. Menier assigned the work to me when I got there that morning. He was my foreman. I worked on that car pretty close to three

(Testimony of A. W. Saline.)

hours. I don't think I finished the job. One of the other boys finished it. I couldn't tell you whether the car went out of the shop that afternoon or not. I don't think it did because I don't think the clutch could have been ready in that time to take the car out.

TESTIMONY OF WILLIAM E. HILL FOR THE DEFENSE.

WILLIAM E. HILL, called as a witness on behalf of the defense, being first duly sworn, testified as follows (Page 540 of Reporter's Transcript):

I am a defendant in this case, and married to Nancy Ammons Hill, a witness for the Government; married in 1916; am not living with her now; have one child nineteen months old; was appointed to the Los Angeles Police Department on the Metropolitan Squad on August 21, 1914. I was detailed down in Chinatown July 1, 1917; worked under Sergeant Jarvis. The duties of a member of the Metropolitan Squad are to raid gambling joints, houses of prostitution and the illegal sale of liquor, mostly. My duties in Chinatown were to patrol. At that time there was a tong war on, and the duty was mostly to patrol and catch violators of opium and lottery.

(Page 543 of Reporter's Transcript) Q By the way, what is the name of that Chinaman that you took up to San Quentin? This is a preliminary question; I will continue it later on. Do you remember a Chinaman that you took up to San Quentin?

A No sir; I never was to San Quentin.

(Testimony of William E. Hill.)

Q Well, I will give you the name of the Chinese. Did you know one Richard Woo?

A Yes sir.

(Page 544 of Reporter's Transcript) I know Hom Hong, a witness in this case. I left the detail of Chinatown work in February of 1918. Went back to walking the beat on the Central Station.

I first got acquainted with Frank Edmondson, the first week I was in Chinatown. That was some time in September, 1918. I remember meeting Edmondson at Sixteenth and Figueroa. The way that meeting took place was that he came to the station one night in November or December with a black eye. He said someone had stolen his cap. He was wearing a uniform at Solomon's Dance Hall, as special police officer. And when he came in there he went over to the hospital and had been doctored up, and came over to the Detective Bureau, and our conversation *stated,* and he told me that later on he expected to get to be Chief of Police at Venice. I believe it was about the time that Harry Raymond was having his trouble. And he said at that time if he ever did land it, he would have a job for some of the boys in the Detective Bureau. Well, I don't remember seeing him any more until, oh, I expect it was along in January or February, quite a long time after that. And there was-- No, I guess it was--no, it was in December, about Christmas time. The Japanese doctors--they had given them some kind of a state examination here, and they seemed that they were practicing here illegally, and

(Testimony of William E. Hill.)

some of them had committed suicide, and some had killed each other, and I got a call at First and Wilmington upstairs to a Japanese, that he thought someone was trying to kill him. And when I got down there they all seemed very much scared and said that they wanted me to stay there and watch them; and I told them that that was outside of police duty, that I could put in an emergency call and stay there a few minutes and see what the trouble was. And he wanted me to get into an automobile with him and go out in the country to see someone, and I told him that was outside of police duties, and he asked me where I could get a good man. And I told him, yes, because at the time that Frank Edmondson had been up there with that black eye, he had given me some of his cards, and he said, "Anything you can throw my way, I will make it right with you." So I gave the Japanese one of these cards and he called--well, I don't know how he got Frank Edmondson on that. I suppose he called him up about five or six days later than that. Why Frank told me that he had worked a few days for this Japanese, and I think he said he got eight or ten dollars a day from him--big money, anyhow, and he said they didn't want to pay that much any more, so he quit, and he told me that he would pay me my part of the money for getting this job--my commission--as soon as he got it. Well, later on, about the last of January or along about the 1st of February, a lady by the name of Miss Burke that lives at 1122 Georgia Street, and a lady by the name of Miss Rosie Cohn, I

(Testimony of William E. Hill.)

am not sure, came to the office and stated that Miss Cohn's husband, Harry Raymond, was living out in a hotel on West Seventh Street with another woman, and that she wanted us to go out there and make the arrest. It was her husband, and he hadn't supported her. He had just married her one day and left the next; never had supported her. And Miss Burke stated that she knew he was there, because he had some special make of machine and she knew the number of his machine, and she saw this lady drive up to this hotel and get out, and she went into the hotel and saw where they had registered, and she told Miss Cohn and they came to the station. I told her that it was outside of our work--for her to go and get a warrant for him; and she said, no, she wanted him arrested that night. So I called up the Sherman Hotel and left word--it was probably eleven--no, it was-- Yes, pretty near eleven o'clock. Miss Cohn worked at the telephone office, and she got off at ten and then came up there. I left word at the Sherman Hotel for Edmondson to call me up at the police department detective bureau when he came in, and about twelve-thirty, I think it was, he got out of there at twelve, he called me up and asked what I wanted, and I told him that I had some ladies up there that wanted to have a private detective, and he said he would come on up. He came up, and they went into the room there and talked, and Edmondson wanted it to go on until the next day. He said he didn't want to go out there either, and they told him that they didn't have any

(Testimony of William E. Hill.)

money, and so he said, "Well, Hill, if these are friends of yours, why, I will go and see what I can do for them, anyhow." I said, "They are not friends of mine. I have only seen them about an hour or such matter in the morning, so you can do as you like about it. And I think he told me that he went out the next day and found the name on the register all right, and he wanted to go out and arrest them the next night and asked me if I would assist him and Swan. And I told Mr. Proffitt about it, and Mr. Proffitt said, well, he didn't know whether he would want to monkey with anything like that, or not, and I had better ask Mr. McIntosh. So Edmondson came to the station and he stood right back of me when I asked Lieutenant McIntosh--that is the man he was working under, and he said, no, not to monkey with that. "You are a police officer, and you want to leave that kind of stuff alone." I said it was for Edmondson, and he said, "The less you have to do with that man, the better off you are."

Mr. Edmondson, the day after we met him at Sixteenth and Figueroa Street, asked us if we would come to see him the next night. Mr. Proffitt and I went down to the Sherman Hotel. Mr. Proffitt took me down to the Sherman Hotel and I went up to see what he wanted, and Mr. Swan was there at the time. Swan is Edmondson's partner. That was the time he told me about the appointment of Chief of Police that he expected to get at Venice. Mr. Swan was there during our entire conversation. Mr. Proffitt did not

(Testimony of William E. Hill.)

come upstairs to Edmondson's room at the Sherman Hotel. He waited downstairs on the outside in the machine. When I went to meet Edmondson at Sixteenth and Figueroa Street Mr. Proffitt drove me up to that place. We were off duty at the time. We were coupled and working together. I got out of the machine when we got to Sixteenth and Figueroa. Proffitt stayed in the machine. It was about two o'clock on the morning of the 22d that I heard that Edmondson had been arrested, and I asked Proffitt if he had been up to see him, and he said, "No," so I told Proffitt I would go up and see him and do anything I could for him. No person went up to see Edmondson with me. Edmondson asked me to see Lefty James, another officer, and also to see his partner Swan. I first called up and got no response and then Edmondson gave me the telephone number of his office and told me Swan may be there in the Washington Building, so I asked Mr. Proffitt if he would drive me down to James' place, and also to the Washington Building; so then Proffitt and myself went down to the Washington Building and talked to the night watchman. The night watchman informed us that no person was in Edmondson's office, so we went away. We went to Lefty James' place on 48th Street and we told him that Mr. Edmondson asked us if we could come and see him and have him get hold of Claude Morton, the attorney.

Proffitt never went with me to the Crystal Apartments. He never had dinner with me, accompanied by two women taken from the Crystal Apartments.

(Testimony of William E. Hill.)

I never telephoned Hom Hong that Mr. Proffitt would accompany "Cockeye" Smith over to Pasadena. I never discussed with Mr. Proffitt at any time or at any place the question of opium. (Page 568) On February 9, 1919, we got through work, Mr. Proffitt and I, about eight o'clock, and he said to me, "If you will ride out"--I could go by--take a Grand Avenue car, and take a Vermont and Georgia, and ride around on Vernon Avenue and right around to my place, after I moved to Grand Avenue and 43d, and he said, "If you will ride out by my place I will get the machine, because I have got to go down right by your place to see Roy Holmes to get my machine fixed," so we went down to Third Street and caught the Vermont and Georgia car. To the best of my recollection there were lots of mornings when my wife was sick that I would eat hot cakes before going home, because there was no one to keep house for me. She was with her mother, and convalescent; and I believe, to the best of my recollection, we went near Third and Broadway, right around the corner between Spring and Broadway and ate some waffles, but I (Page 569 of Reporter's Transcript) couldn't swear to that because I am not sure whether we did this morning or not; but anyhow we rode out to his place on the car, and he got his automobile out and we went down to find Roy Holmes. He had one number--he had the number of the place, and I was intending later on to go up in Antelope Valley with my folks and go rabbit hunting, and I had been told--and the fact of the

(Testimony of William E. Hill.)

matter was he had been stationed there many times, with shotguns, and I didn't have any shotgun, and I wanted to know what his address was so that I could borrow it from him later on, so I went down with Mr. Proffitt to the place, and we had gotten the wrong number; so we drove past the place down as far as Budlong, and went into a place and asked where Holmes lived, and they told us it was about four houses up from the corner, where a big flag was out; so Mr. Proffitt just walked right up from this house and he asked for information and told me to drive on, and the machine was hard to start, I didn't understand it very well, so he just walked up there and talked to Mr. Holmes and went in the house and I waited about five minutes and he came out, and he took me as far as Vernon and Vermont and I caught the Vernon Avenue car. He was going to take me over home, but there was a car right there in sight and I told him I would just grab it. We didn't have to pay any carfare; we rode on our badge.

With reference to using Mrs. Fisher's phone, I did not call up any Chinese from her house. I received a call there from a Chinaman; there were two of them, Tom Wah, 915 Central Avenue, and another whose name I cannot at this moment recall, at 115 1/2 Commercial Street. They told me to come down and get a turkey--to come to their place and get a turkey; this was shortly before Christmas, probably between the 15th and 25th of December, 1918. Ching Wing is the man that lives at Commercial Street. Every man that

(Testimony of William E. Hill.)

ever worked in Chinatown always received a turkey for Christmas.

I did not meet Mr. Proffitt at Pasadena on Sunday, February 9, 1919. I was never present in Pasadena when Wong Wing gave a glass of water or a cigar to Mr. Proffitt.

CROSS-EXAMINATION.

(Page 586 of Reporter's Transcript, at page 588-9)

Q BY MR LAWSON: How long have you known Tom Wah?

A Since I first went on the police department in 1914.

Q 1914? A Yes sir.

Q How many times have you ever raided his place? A Yes sir.

MR. DOMINGUEZ: That is objected to-- Just a minute, Mr. Hill.

THE WITNESS: Excuse me.

MR. DOMINGUEZ: That is objected to on the ground it is not cross-examination, incompetent, irrelevant and immaterial.

THE COURT: I thought he gave testimony on that, or I have gotten the Chinamen mixed.

MR. DOMINGUEZ: Yes. He is asking about Tom Wah, as I understand it.

MR. LAWSON: Yes, I expect it is.

MR. DOMINGUEZ: I ascribe the conduct of the District Attorney as misconduct.

MR. LAWSON: Your Honor, I merely have tried to get in all the facts with reference to this date

(Testimony of William E. Hill.)

in regard to any Chinamen that he was examined about.

THE COURT: The fact that he raided another Chinaman might have some bearing upon it. I will overrule the objection.

MR. DOMINGUEZ: Exception.

That thereafter, to wit, at about the hour of 3:47 o'clock P. M. on the 5th day of June, 1919, the jury returned duly and regularly into court their verdict finding the said defendant, Howard Proffitt, guilty as charged in the first, second, third and fourth counts of the indictment.

That the time for sentencing said defendant was thereupon duly continued by the Court until the 17th day of June, 1919, upon which date the said defendant filed in said court his motion for a new trial. That thereupon on said date the Court duly and regularly heard the motion of said defendant for a new trial and duly and regularly made its order denying said motion, to which ruling the exception of the defendant was duly made and entered, and thereupon, on the same day, said defendant filed his motion in said Court in arrest of judgment and the Court thereupon heard the same and duly and regularly made its order denying the said motion in arrest of judgment, to which ruling the exception of the said defendant was duly made and entered, and thereupon the Court duly and regularly pronounced sentence upon the defendant, Howard Proffitt, adjudging that he be imprisoned

(Testimony of William E. Hill.)

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That the time for sentencing said defendant was thereupon duly continued by the Court until the 17th day of June, 1919, upon which date the said defendant filed in said court his motion for a new trial. That thereupon on said date the Court duly and regularly heard the motion of said defendant for a new trial and duly and regularly made its order denying said motion, to which ruling the exception of the defendant was duly made and entered, and thereupon, on the same day, said defendant filed his motion in said Court in arrest of judgment and the Court thereupon heard the same and duly and regularly made its order denying the said motion in arrest of judgment, to which ruling the exception of the said defendant was duly made and entered, and thereupon the Court duly and regularly pronounced sentence upon the defendant, Howard Proffitt, adjudging that he be imprisoned

in the Federal Penitentiary, at McNeil Island for the period of two years on the first count, two years' imprisonment on the second count, with a fine of Fifty Dollars ($50.00), two years' imprisonment on the third count, with a fine of Fifty Dollars ($50.00), and two years' imprisonment on the fourth count, with a fine of Fifty Dollars ($50.00), said terms of imprisonment to run concurrently.

Thereupon, on the said 17th day of June, 1919, the said defendant duly and regularly filed in said court his petition for a writ of error, and concurrently therewith his assignment of errors. That the Court at said time allowed said writ of error and fixed a supersedeas bond upon appeal in the sum of Five Thousand Dollars ($5,000.00), to be duly given by the said defendant. That thereafter, to wit, on said 17th day of June, 1919, said defendant gave and filed in said Court his said bond in the said sum of Five Thousand Dollars ($5,000.00), which was duly approved and allowed by said Court.

That thereupon, on said 17th day of June, 1919, a writ of error duly issued in said cause, returnable before the United Statets Circuit Court of Appeals for the Ninth Circuit. That thereupon, upon said date, citation on said writ of error was duly issued, served upon the United States District Attorney, and filed with the clerk of said court.

The indictment, demurrer, order overruling the demurrer, petition for writ of error, assignment of errors and the various orders and proceedings of the Court referred to herein, are fully set out in the

printed record on appeal of the clerk to be filed herein and ordered to be printed herewith.

PRESENTATION OF BILL OF EXCEPTIONS, NOTICE THEREOF, AND STIPULATION FOR SETTLEMENT AND ALLOWANCE.

The defendant, Howard J. Proffitt, hereby presents the foregoing as his bill of exceptions herein and respectfully asks that the same may be allowed.

Frank E. Dominguez
Milton M. Cohen
Will H. Willis
Attorneys for Defendant,
Howard J. Proffitt.

To Robert J. O'Connor, Esq., United States District Attorney for the Southern District of California:

You will please take notice that the foregoing constitutes and is the proposed Bill of Exceptions of the defendant, Howard J. Proffitt, in the above entitled action, and that said defendant will ask the allowance of the same.

Frank E. Dominguez
Milton M. Cohen
Will H. Willis
Attorneys for Defendant,
Howard J. Proffitt.

Service of the foregoing Bill of Exceptions is hereby accepted and acknowledged this 28th day of October, 1919.

Gordon Lawson
Asst. United States Attorney,
Attorney for the United States of America.

STIPULATION AS TO CORRECTNESS OF BILL OF EXCEPTIONS.

It is hereby stipulated that the foregoing Bill of Exceptions is correct; and that the same be settled and allowed by the Court.

Frank E. Dominguez
Milton M. Cohen
Will H. Willis
Attorneys for Deft., Howard J. Proffitt.
W. F. Palmer,
Asst. United States Attorney,
Attorney for the United States of America.

ORDER ALLOWING BILL OF EXCEPTIONS AND MAKING SAME PART OF THE RECORD.

The foregoing Bill of Exceptions, having been duly presented to the Court, is hereby duly allowed and signed and made a part of the Records in this cause.

Dated this 1 day of Nov, 1919.

OscarA.Trippet
Judge.

[Endorsed]: ORIGINAL No. 1721 Crim. IN THE DISTRICT COURT OF THE UNITED

STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. THE UNITED STATES OF AMERICA, Plaintiff, vs. HOWARD J. PROFFITT, et al., Defendants. BILL OF EXCEPTIONS. FILED Nov 1 1919 *at35min.past*10 *o'clock A.M. CHAS. N. WILLIAMS, Clerk* Louis J. Somers *Deputy* FRANK DOMINGUEZ & M. M. COHEN Attorneys at law, 703 California Building, Los Angeles, California, Bdwy 6237 Attorneys for Defendant Proffitt.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff, -vs- HOWARD J. PROFFITT, et al, Defendants.	No. 1721 Criminal. PETITION FOR WRIT OF ERROR.

Your petitioner, Howard J. Proffitt, one of the defendants in the above-entitled cause, for himself alone and for no other defendant, brings this, his petition for a writ of error to the District Court of the United States, in and for the Southern District of California, and in that behalf your petitioner says:

That on the 16th day of June, 1919, there was made, given and rendered in the above-entitled court and cause a judgment against your petitioner whereby your peti-

tioner was adjudged and sentenced to a fine of One hundred & fifty Dollars and imprisonment in the penitentiary at McNeil Island for a period of four years, and your petitioner says that he is advised by his counsel and avers that there was and is manifest error in the records and proceedings had in said cause, and in the making, giving and entry of such judgment and sentence, to the great injury and damage of your petitioner, and each and all of which errors will be more fully made to appear by an examination of said records, and by an examination of the Bill of Exceptions to be hereafter by your petitioner tendered and filed, and the assignment of errors which is filed with this petition, and to that end that the judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and our petitioner prays that writ of error may be issued directed therefrom to the said District Court of the United States, for the Southern District of California, Southern Division, returnable according to law and the practice of the Court, and that there may be directed to be returned pursuant thereto a true copy of the record, Bill of Exceptions, Assignment of Errors, and all proceedings had and to be had in said cause, and that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioner.

And your petitioner makes the assignment of errors filed herewith, upon which he will rely, and will be

made to appear by a return of the said record, in obedience to said Writ.

WHEREFORE, your petitioner prays the issuance of a writ as herein prayed, and that the assignment of errors filed herewith may be considered as his assignment upon the Writ, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause be remanded for further proceedings, and that he be awarded a supersedeas upon said judgment, and all necessary process, including bail.

Frank E. Dominguez,
Milton M. Cohen
Attorneys for defendant, Howard J. Proffitt.

The writ is allowed and supersedeas bond is fixed at the sum of $3000.

Oscar A Trippet
Judge

[Endorsed] ORIGINAL No. 1721 CRIM. In the United States District Court Southern District of California Southern Division UNITED STATES OF AMERICA, *Plaintiff vs.* HOWARD J. PROFFITT, et al, *Defendants* PETITION FOR WRIT OF ERROR FILED JUN 17 1919 *Chas. N. Williams, Clerk* Ernest J. Morgan *Deputy* FRANK E. DOMINGUEZ MILTON M. COHEN Attorneys for Defendant, HOWARD J. PROFFITT.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

. . . . . .

UNITED STATES OF AMERICA, Plaintiff,	)	No. 1721 Crim.
-vs-	)	ASSIGNMENT OF ERRORS.
HOWARD J. PROFFITT, et al, Defendants.	)	

Comes now Howard J. Proffitt, a defendant above named, and for himself alone and no other defendant, files the following statement and assignment of errors, upon which he will rely in the prosecution of a writ of error of the above entitled cause, a petition for which writ, on behalf of said defendant, is filed at the same time with this assignment.

I.

The court erred in overruling the demurrer of the defendant to the indictment in said cause for the following reasons:

(a) That said indictment does not, nor does any count or paragraph thereof, state facts sufficient to constitute a punishable offense, or any offense or crime against the laws or statutes of the United States of America.

(b) That said indictment does not substantially conform to, or comply with, the requirements of Section 950 of the Penal Code of the State of California, the state of which this court is holden.

(c) That said indictment does not substantially conform to or comply with the requirements of Section 951 of said Penal Code.

(d) That said indictment does not substantially conform to or comply with the requirements of Section 952 of said Penal Code.

(e) That more than one offense is charged in said indictment except as provided in Section 954 of the Penal Code of the State of California, the state of which this court is holden.

(f) That said indictment is not direct or certain as regards the particular circumstances of the offense attempted to be charged, and that said circumstances are necessary to be alleged in order to constitute a complete offense.

That said indictment is not direct or certain sufficiently to inform the defendants herein of the particular circumstance of the offense with which they are attempted to be charged.

That said uncertainty consists in the following matters:

That it cannot be ascertained from the second count of said indictment how these demurring defendants did on or about the 8th day of February, 1919, or at any other time, in the Southern Division of the Southern District of California, or at any other place, receive or conceal or did facilitate in the transportation or concealment of opium.

That it cannot be ascertained from a reading of the allegations in the third count of the indictment how these demurring defendants did, on or about the 21st

day of February, 1919, or at any other time, in the Southern Division of the Southern District of California, receive or conceal or did facilitate in the transportation or concealment of opium.

That it cannot be ascertained from a reading of the allegations in the fourth count of the indictment how these demurring defendants did on or about the 21st day of February, 1919, at the City of Los Angeles, County of Los Angeles, State of California, receive or conceal or facilitate in the transportation or concealment of opium.

(g) That second count in the said indictment does not conform to Section 37 of the Penal Code of the United States in that there is no statement or attempt at statement of any overt act in so far as these demurring defendants are concerned.

(h) That third count in the said indictment does not conform to Section 37 of the Penal Code of the United States in that there is no statement or attempt at statement of any overt act in so far as these demurring defendants are concerned.

(i) That fourth count in the said indictment does not conform to Section 37 of the Penal Code of the United States in that there is no statement or attempt at statement of any overt act in so far as these demurring defendants are concerned.

(j) That the grand jury by which the indictment was found had no legal authority to inquire into the offense charged.

(k) That second count in said indictment is bad, defective, and *duplitious;* that said second count is

defective for the reason that there is a misjoinder of offenses; that more than one offense is charged in said second count of said indictment.

(l) That third count in said indictment is bad, defective, and *duplitious;* that said third count is defective for the reason that there is a misjoinder of offenses; that more than one offense is charged in said third count of said indictment.

(m) That fourth count in said indictment is bad, defective, and *duplitious;* that said fourth count is defective for the reason that there is a misjoinder of offenses; that more than one offense is charged in said fourth count of said indictment.

II.

The court erred in overruling the objection of the defendant to the questions propounded to the witness Roy B. Holmes, which questions, objections, answers and exceptions are as follows: -

"Q Is that the Baptieste car?

"A It was, sir.

"Q Now, who is Baptieste?

MR. DOMINGUEZ: That is objected to as not cross-examination, as incompetent and immaterial.

MR. LAWSON: I think it will be very material before we get through, your Honor.

"THE COURT: I think it is material. I will overrule the objection.

"A Well, I can't interpret what you mean by "who".

"Q He was a negro, was he not?

"A He was a negro that lived somewhere around Central Avenue and 10th or 11th Street.

"Q BY MR LAWSON: Now, don't you know that Baptieste was picked up by Proffitt and Hill when he had opium in his possession; that he was taken down to the police station, and that his car was taken away from him and put in your garage?

"MR DOMINGUEZ: That is objected to as incompetent, irrelevant and immaterial and not proper cross-examination, and I ascribe the question as gross misconduct on the part of the District Attorney, the question having but one purpose, and that is to prejudice this jury against the defendant Proffitt on a collateral matter.

. . . . . .

"Q From whom did you get the car?

"A Mr Baptieste or someone called up my office and said their car was in front of a place on Central Avenue and wouldn't run, and I says, 'We will be over there as soon as we can.'

"Q Was Baptieste under arrest at the time?

"MR. DOMINGUEZ: That is objected to as incompetent, irrelevant and immaterial and not cross-examination; and I again ascribe the question of the District Attorney as gross misconduct. This question is asked solely for the purpose of influencing this jury against this defendant Proffitt."

III.

The court erred in overruling the objection of the defendant to the questions propounded to the witness Nellie I. Holmes, in reference to a conversation which the witness had with another witness outside the pres-

ence of any defendant, which questions, objections, answers and exceptions are as follows:

Question propounded to witness Nellie I. Holmes with reference to conversation and actions of her husband, Roy B. Holmes:

"Q What did he do when he came home?

"A Well, he seemed to be terribly excited and - -

"MR. DOMINGUEZ: Just a moment: Now, I move to strike that out on the ground it is not responsive.

"THE COURT: I think it is responsive. Go ahead.

"MR. DOMINGUEZ: Exception. It is hearsay - - calling for hearsay.

"Q BY MR. LAWSON: Just proceed, Mrs. Holmes.

"A He came in and he pulled down all the front curtains- -something that never happens only once in six or eight years.

"MR DOMINGUEZ: Just a moment. I move to strike that out on the ground the same is incompetent, irrelevant and immaterial, without the issues of this case and not binding on either defendant, what Holmes told her.

"THE COURT: If I remember right, Mr. Dominguez, Mr. Holmes was asked these questions. "Weren't you excited when you got home?' And, "Didn't you go in and pull the curtains down?' and he denied it. Now, if that is so, this evidence is admissible.

. . . . . .

"THE COURT. The objection will be overruled. Proceed.

"Q BY MR. LAWSON: Just go on now, if there is anything else.

"A What I mean by 'six or eight years,' I don't think they have ever been pulled down but twice since we are married, and that was twice since this supposed hold-up has happened.

"MR DOMINGUEZ: I move to strike out the last statement of this witness on the ground that the same is incompetent, irrelevant and immaterial, hearsay, her conclusion and opinion, and ask the court to instruct the jury to disregard that statement.

"THE COURT: Read the answer.

"THE COURT: I will overrule the motion to strike out.

"MR. DOMINGUEZ: Exception.

. . . . . .

"Q Now, I will ask you, Mrs. Holmes, if this conversation did not take place, if not the exact words, in substance?

"MR DOMINGUEZ: Now, we desire to offer an objection to this question, on the ground that the same is incompetent, irrelevant and immaterial, calling for hearsay evidence outside of the presence of either one of these defendants.

"MR LAWSON: You understand, your Honor, this is impeaching testimony.

"THE COURT: The question you are going to ask her now is the same question you submitted to Mr. Holmes?

"MR. LAWSON: Yes, your Honor, the same question that was propounded to the witness Holmes. This is purely for the purpose of impeachment.

"THE COURT: Under those circumstances, Mr. Dominguez, what objection have you got?

"MR. DOMINGUEZ: None. I didn't know his explanation - -

"THE COURT: All right.

"MR. DOMINGUEZ: Of what he intended to do.

"Q BY MR LAWSON: Mr. Holmes stated, or asked you, Mrs. Holmes, if you remembered a Sunday last February when Mr. Proffitt was at your house, and if you, Mrs. Holmes said, 'Do you mean the Sunday that Hill and Proffitt came while I was taking Hazel to Sunday-school?' Then Mr. Holmes said, 'That is the Sunday that I mean, but Hill was not with Proffitt.' Then you, Mrs. Holmes, said, 'Yes, he was. Don't you remember you told me that that was Hill? And I afterwards told you that Mrs. Merry said, after I described him to her, that he was the same man who came to borrow a gun while we were at Pasadena with the Kesters.' Then Mr. Holmes said to you, Mrs. Holmes, 'No, Hill was not there.' Then you, Mrs. Holmes, said, 'He certainly was.' Then Mr. Holmes said, 'Well, if he was, I didn't know it. I certainly did not see him.' And then Mr. Holmes further said, 'It will be a good thing for you to forget it if you saw him, for Hill is trying to prove that he was sick in bed at the time that they were supposed to have held up those Chinamen.' And then Mr. Holmes further said,

"THE COURT. The objection will be overruled. Proceed.

"Q BY MR. LAWSON: Just go on now, if there is anything else.

"A What I mean by 'six or eight years,' I don't think they have ever been pulled down but twice since we are married, and that was twice since this supposed hold-up has happened.

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"THE COURT: All right.

"MR. DOMINGUEZ: Of what he intended to do.

"Q BY MR LAWSON: Mr. Holmes stated, or asked you, Mrs. Holmes, if you remembered a Sunday last February when Mr. Proffitt was at your house, and if you, Mrs. Holmes said, 'Do you mean the Sunday that Hill and Proffitt came while I was taking Hazel to Sunday-school?' Then Mr. Holmes said, 'That is the Sunday that I mean, but Hill was not with Proffitt.' Then you, Mrs. Holmes, said, 'Yes, he was. Don't you remember you told me that that was Hill? And I afterwards told you that Mrs. Merry said, after I described him to her, that he was the same man who came to borrow a gun while we were at Pasadena with the Kesters.' Then Mr. Holmes said to you, Mrs. Holmes, 'No, Hill was not there.' Then you, Mrs. Holmes, said, 'He certainly was.' Then Mr. Holmes said, 'Well, if he was, I didn't know it. I certainly did not see him.' And then Mr. Holmes further said, 'It will be a good thing for you to forget it if you saw him, for Hill is trying to prove that he was sick in bed at the time that they were supposed to have held up those Chinamen.' And then Mr. Holmes further said,

'It may be that you will be called on to be a witness. They had me down there today, and if you are called you just forget that you saw Hill.'

"Now, did that conversation take place between you and Mr Holmes at that time and place?

"A Yes, sir.

"Q In the presence of you and Mr Holmes?

"A Yes sir.

"THE COURT: She stated the presence.

"Q BY MR LAWSON: Now, Mrs Holmes, on the same evening of May 29th, on Thursday night, at your home, in the city of Los Angeles, I will ask you if this conversation did not take place between you and Mr Holmes, you two being the only parties present at that time. I might further say, did you have a conversation at that time in the house?

"A Yes sir.

"Q I will ask you if this is the conversation that took place at that time: You, Mrs Holmes, stated to Mr Holmes that 'You were mixed up with this man Proffitt in opium deals.' And further said, 'Well, I have tried to get you to stay away from them and not mix into police affairs enough, and if you had been at home when you should have been, you would not have had it to say, that is, to testify.' Then Mr Holmes said, 'I never was mixed up or had anything to do with them.' Then you, Mrs Holmes, said, 'You certainly did. You seem to know all about that fellow you call Nigger Baptieste.' And then Mr Holmes said, 'I did not.' Then you, Mrs Holmes, further said to him,

'Well, I suppose you have forgotten that you told Mr and Mrs Schlotzhauer and Mr and Mrs Kunkel and myself, that the Nigger's car that the Government was looking for was at your shop, and that they were looking for it all over, and that you knew that there was opium hid in it, and you hadn't looked for it yet, but was pretty sure there was a secret place in the car where the stuff was hid.' Then Mr Holmes said, 'You are driving me crazy; you always misinterpret things so.' And then Mr Holmes said to you, 'I told you that the car was in the shop and the Government had looked for it.' Then Mr Holmes said this to you, 'The car was in the shop, yes, and the Government had looked for it, but I never mentioned opium.' Then you said to Mr Holmes, 'You certainly did; and if they ask me to testify, I will ask Grace and Addie, and I bet they will remember it.' And then you further said to Mr Holmes, 'What about Cockeye Smith? I guess you forget about telling me that you were going to San Diego with the sheriff to get him. And when you got back you told me that you had found him, and had come back by way of Seal Beach, and that you had dinner there about three o'clock; and that you lied to me - - you went to San Diego with a couple of women, and I suppose another man.' Then Mr Holmes said, 'I didn't', then you said, 'You did.' Then Mr Holmes said, 'Well, who told you? Addie?' Then you said, 'No, he did not, and it is none of your business who did, but I know you did.' And then Mr Holmes further said, well, there were two women in the crowd,

but they were not with me; they were with the other fellows.' Then you said to Mr Holmes, 'I suppose you played chauffeur.' Then Mr Holmes said, 'Well, you are always picking fights with me. What have I done to bring this on?' Then you said to Mr Holmes, 'I am not fighting but want you to understand that I won't lie for you or anybody else.' Then Mr Holmes said, 'I don't want you to, nor nobody asked you to.' Then you said to Mr Holmes, 'You certainly did just a few minutes ago. You asked me to forget that Mr Hill was in the car with Mr Proffitt. I want you to understand that I won't lie. If I am called on to be a witness I will tell the truth if I can remember and be sure, and if I don't remember, I will say so.' Then Mr Holmes said, 'Well, is there anything good left of me?' And you said to Mr Holmes, 'Yes, there is. You are the best hearted fellow that ever lived.' And Mr Holmes said, 'Is that all?' Then you said, 'When I said that, I mean the bottom of everything. If you would stay at home with your family and go out with decent people and treat my friends as you should everything would go all right every way; but as long as you go with a crowd like you have been, and have nothing to do with your family, you can never expect to be happy, for nobody can make you happy, me or any other woman.' Then Mr Holmes said, 'Don't worry, there will never be any other woman with me.' Then Mr Holmes said, 'I only hope that I can fix things inside of thirty day so that my children will never have to go without, and I will get out of the way. There is only

one person that I know I can trust, and that is God.' And then you said, 'You had better not be so sure of it, the way you have been living.' Then Mr Holmes said, 'Nellie, I had a nice surprise for you. Do you know what I am thinking of?' Then you said, 'No.' Then Mr Holmes said, 'Are you sure? Then you said, 'Why, yes.' Then Mr Holmes said, 'Well, I don't know whether to tell you, or not, but I believe I will.' Then Mr Holmes further said, 'I was going to surprise you by putting you in your own home inside of three months from now. I have had a big business proposition offered me, and it is still hanging fire, but if it goes through the least that I will make the first year will be $20,000, and I am still in debt to Charlie Gorton five thousand or seven thousand dollars. I am paying him when I can. And I was going to try to have you in your own home in about three months from now.' Then Mr Holmes further said he had changed the combination on the safe at the shop, because he couldn't trust Eddie Menier, his foreman, because small amounts of money had been missed, and also a book of Stevens-Duryea parts and a list of Stevens-Duryea owners which he thought Eddie probably had taken, as he was considering going into business for himself.

"Now, did that conversation take place at that time?

"A Yes sir.

"MR DOMINGUEZ: Just a moment. To which we object on the ground that the same is incompetent, irrelevant and immaterial, calling for hearsay, not tend-

ing to prove or disprove any issues in this case, the question asked, and the statement made being purely on collateral matters, and not impeaching or tending to impeach the witness Holmes in any matter to which he testified in this case, bearing upon the issues in the case.

"THE COURT: Now, if Mr Holmes had this conversation with this witness, he was interesting himself in the trial of this case, and I think for that reason it is relevant, if that is your only objection.

"MR DOMINGUEZ: All the objections that I made, if your Honor please, are in the record. It is incompetent, irrelevant and immaterial and calls for hearsay.

"THE COURT: The objection will be overruled.

"MR DOMINGUEZ: Yes sir. Exception.

"THE COURT: What is your answer?

"THE WITNESS: Yes sir.

"MR DOMINGUEZ: May I at this time, with your Honor's permission, object to your Honor's statement that the witness Holmes had an interest in this case?

"THE COURT: No, I did not say that.

"MR DOMINGUEZ: Well, pardon me.

"THE COURT: I said if he stated these things to this witness, it will show that he had interested himself.

"MR DOMINGUEZ: Pardon me, then, if your Honor please.

"THE COURT: That he had interested himself in this case.

"MR LAWSON: You may cross-examine."

IV.

The Court erred in rendering its judgment in this cause against the defendant, for the reason that the indictment in said cause does not charge the defendant with any offenses against or in violation of the laws of the United States of America.

V.

The Court erred in rendering its judgment in this cause against this defendant, for the reason that the evidence introduced in the trial of said cause was not sufficient to justify the verdict of the jury therein, or the judgment of the Court against the defendant.

VI.

The Court erred in rendering its judgment in this cause against this defendant, for the reason that the testimony did not show or tend to show that the defendant had committed any offense set out, or attempted to be set out, in the indictment.

VII.

The Court erred in rendering its judgment in this cause against the defendant, for the reason that the testimony introduced at the trial of said cause did not tend to connect the defendant with the commission of any offense set out in the indictment.

VIII.

The Court erred as a matter of law in denying the defendant's motion for a new trial, to which ruling the exception of the defendant was duly taken and allowed.

IX.

The Court erred as a matter of law in denying the defendant's motion in arrest of judgment, to which ruling the exception of the defendant was duly taken and allowed.

Frank E. Dominguez
Milton M. Cohen
Attorneys for defendant, Howard J. Proffitt.

And upon the foregoing assignment of errors and upon the record in said cause, the defendant, Howard J. Proffitt, prays that the verdict and judgment rendered therein may be reversed.

Dated this 16th day of June, 1919.

Frank E. Dominguez
Milton M. Cohen
Attorneys for defendant, Howard J. Proffitt.

We hereby certify that the foregoing assignment of errors is made in behalf of the petitioner for writ of error, and is in our opinion well taken, and the same now constitutes the assignment of errors upon the writ prayed for.

FrankE. Dominguez
Milton M. Cohen
Attorneys for defendant, Howard J. Proffitt.

[Endorsed]: ORIGINAL No. 1721 CRIM. In the United States District Court Southern District of

California Southern Division UNITED STATES OF AMERICA, *Plaintiff vs.* HOWARD J. PROFFITT, et al., *Defendants* ASSIGNMENT OF ERRORS FILED JUN 17 1919 *Chas. N. Williams, Clerk* Ernest J.Morgan *Deputy* FRANK E. DOMINGUEZ MILTON M. COHEN Attorneys for Defendant, HOWARD J. PROFFITT.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

. . . . . .

UNITED STATES OF AMERICA, Plaintiff,	)	No. 1721 Crim.
-vs-	)	BOND PENDING DECISION UPON WRIT OF ERROR.
HOWARD J. PROFFITT, et al, Defendants.	)	

KNOW ALL MEN BY THESE PRESENTS:

That we, Howard J. Proffitt, of the County of Los Angeles, State of California, as principal, and National Surety Company ~~of New York,~~ a corporation incorporated under the laws of the State of New York and authorized to do business in the State of California, as surety, are jointly and severally held and firmly bound unto the United States of America, in the full and just sum of Three Thousand —— Dollars ($3000.00) to be paid to the said United States of

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Howard J. Proffitt and William E. Hill,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

FRANK E. DOMINGUEZ,
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Parker & Stone Co., Law Printers, 232 New High St., Los Angeles, Cal.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Howard J. Proffitt and William E. Hill,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error, hereinafter called the defendant, on the 18th day of April, 1919, was indicted by the grand jury of the United States in and for the Southern District of California, Southern Division, which said grand jury did find and return unto the District Court of the United States in and for the Southern District of California, Southern Division, its indictment against said defendant Howard J. Proffitt for violation of section 37 of the Federal Penal Code, conspiracy to violate the Act of January 17, 1914,

and violation of the Act of January 17, 1914, and thereafter, on the 21st day of April, 1919, the said Howard J. Proffitt appeared in said court and was duly arraigned upon the said indictment and entered his plea of "not guilty" thereto, and thereafter, on the 22d day of April, 1919, the said Howard J. Proffitt filed a demurrer to said indictment [Tr. p. 17], and thereafter, on the 26th day of May, 1919, the said demurrer was duly heard by said court, which duly and regularly made its order overruling said demurrer, to which order of the court then and there made overruling the demurrer of said defendant, the said defendant took an exception, which exception was then and there duly and regularly allowed and entered by the court.

That thereafter, on the 27th day of April, 1919, said cause came on duly and regularly for trial, the Government being represented by Fleet W. Palmer and Gordon Lawson, Esqs., assistant United States district attorneys for the Southern District of California, and the defendant being represented by Frank E. Dominguez, William H. Willis and Milton M. Cohen, Esqs. Thereupon the jury to try the case was duly and regularly impaneled and the trial of the case regularly proceeded. [See Tr. pp. 85-200.]

That thereafter, to-wit, at about the hour of 3:47 o'clock p. m., on the 5th day of June, 1919, the jury returned duly and regularly into court their verdict finding the said defendant Howard J. Proffitt guilty as charged in the first, second, third and fourth counts of the indictment.

That the time for sentencing said defendant was thereupon duly continued by the court until the 17th day of June, 1919, upon which date the said defendant filed in said court his motion for a new trial. That thereupon, on said date, the court duly and regularly heard the motion of said defendant for a new trial and duly and regularly made its order denying said motion, to which ruling the exception of the defendant was duly made and entered, and thereupon, on the same day, said defendant filed his motion in said court in arrest of judgment and the court thereupon heard the same and duly and regularly made its order denying the said motion in arrest of judgment, to which ruling the exception of said defendant was duly made and entered; thereupon the court duly and regularly pronounced sentence upon the defendant Howard J. Proffitt, adjudging that he be imprisoned in the Federal prison at McNeil Island for a period of two years on the first count, two years' imprisonment on the second count with a fine of fifty dollars, two years' imprisonment on the third count with a fine of fifty dollars, and two years' imprisonment on the fourth count with a fine of fifty dollars, said terms of imprisonment to run concurrently. Thereupon, on the said 17th day of June, 1919, the said defendant duly and regularly filed in said court his petition for a writ of error [see Tr. p. 201] and concurrently therewith his assignments of errors [see Tr. pp. 204-219]. That the court at said time allowed said writ of error and fixed a supersedeas bond on appeal in the sum of five thousand dollars to be duly given by the said defendant. That thereafter,

to-wit, on said 17th day of June, 1919, said defendant gave and filed in said court his said bond in the said sum of five thousand dollars [Tr. p. 219], which was duly approved and allowed by said court. [See Tr. p. 222.] That thereupon, on said 17th day of June, 1919, a writ of error duly issued in said cause returnable before the United States Circuit Court of Appeals for the Ninth Circuit. [See Tr. p. 3.] That thereupon, upon said date, citation on said writ of error was duly issued, served upon the United States district attorney and filed with the clerk of said court. [See Tr. p. 2.]

The indictment, demurrer, order overruling the demurrer, petition for writ of error, assignment of errors and the various orders and proceedings of the court referred to herein are fully set out in the printed record on appeal of the clerk on file herein, together with the bill of exceptions [see Tr. pp. 85-200], which was duly allowed and signed and made a part of the records in this case on the first day of November, 1919, by the Honorable Oscar A. Trippet, judge of said court.

The indictment [see Tr. pp. 5-14] contains four counts. The first count is an attempt to charge a conspiracy on the first day of January, 1919, and continuously thereafter up to and including the date of the filing of the indictment, to violate the Act of Congress approved January 17, 1914, and entitled, "AN ACT REGULATING THE MANUFACTURE OF SMOKING OPIUM WITHIN THE UNITED STATES AND FOR OTHER PURPOSES," the indictment setting forth four overt acts alleged to have occurred in furtherance of said con-

spiracy, the second count being an attempt to allege that the defendant did on or about the 8th day of February, 1919, violate the said act, and the third count being an attempt to allege that the defendant did on or about the 21st day of February, 1919, violate said act, and the fourth count being an attempt to allege that the defendant did, on or about the 21st day of February, 1919, violate said act.

There are no overt acts charged under the second, third and fourth counts of said indictment, and the defendant's name does not appear in connection with any of the four overt acts charged under the first count of said indictment.

SPECIFICATIONS OF ERRORS.

Assignment No. I is as follows:

The court erred in overruling the demurrer of the defendant to the indictment in said cause for the following reasons:

(a) That said indictment does not, nor does any count or paragraph thereof, state facts sufficient to constitute a punishable offense, or any offense or crime against the laws or statutes of the United States of America.

(b) That said indictment does not substantially conform to, or comply with, the requirements of section 950 of the Penal Code of the state of California, the state of which this court is holden.

(c) That said indictment does not substantially conform to or comply with the requirements of section 951 of said Penal Code.

(d) That said indictment does not substantially conform to or comply with the requirements of section 952 of said Penal Code.

(e) That more than one offense is charged in said indictment except as provided in section 954 of the Penal Code of the state of California, the state of which this court is holden.

(f) That said indictment is not direct or certain as regards the particular circumstances of the offense attempted to be charged, and that said circumstances are necessary to be alleged in order to constitute a complete offense.

That said indictment is not direct or certain sufficiently to inform the defendants herein of the particular circumstance of the offense with which they are attempted to be charged.

That said uncertainty consists in the following matters:

That it cannot be ascertained from the second count of said indictment how these demurring defendants did on or about the 8th day of February, 1919, or at any other time, in the Southern Division of the Southern District of California, or at any other place, receive or conceal or did facilitate in the transportation or concealment of opium.

That it cannot be ascertained from a reading of the allegations in the third count of the indictment how these demurring defendants did, on or about the 21st day of February, 1919, or at any other time, in the Southern Division of the Southern District of Cali-

fornia, receive or conceal or did facilitate in the transportation or concealment of opium.

That it cannot be ascertained from a reading of the allegations in the fourth count of the indictment how these demurring defendants did on or about the 21st day of February, 1919, at the city of Los Angeles, county of Los Angeles, state of California, receive or conceal or facilitate in the transportation or concealment of opium.

(g) That second count in the said indictment does not conform to section 37 of the Penal Code of the United States in that there is no statement or attempt at statement of any overt act in so far as these demurring defendants are concerned.

(h) That third count in the said indictment does not conform to section 37 of the Penal Code of the United States in that there is no statement or attempt at statement of any overt act in so far as these demurring defendants are concerned.

(i) That fourth count in the said indictment does not conform to section 37 of the Penal Code of the United States in that there is no statement or attempt at statement of any overt act in so far as these demurring defendants are concerned.

(j) That the grand jury by which the indictment was found had no legal authority to inquire into the offense charged.

(k) That second count in said indictment is bad, defective, and *duplitious;* that said second count is defective for the reason that there is a misjoinder of

offenses; that more than one offense is charged in said second count of said indictment.

(l) That third count in said indictment is bad, defective, and *duplitious;* that said third count is defective for the reason that there is a misjoinder of offenses; that more than one offense is charged in said third count of said indictment.

(m) That fourth count in said indictment is bad, defective, and *duplitious;* that said fourth count is defective for the reason that there is a misjoinder of offenses; that more than one offense is charged in said fourth count of said indictment.

While counsel for the defendant appreciate that under section 1024, U. S. Rev. Stat., it is proper to embody offenses of the same kind and of the same class in an indictment, so that the indictment will not be bad upon demurrer for duplicity, yet nowhere has counsel been able to find any authority to the effect that several offenses may be embodied in the same count of an indictment.

It is to be observed that in counts II, III and IV of the indictment the defendants are charged with:

1. Importing and bringing into the United States opium contrary to law.
2. Unlawfully receiving opium contrary to law.
3. Concealing opium contrary to law.
4. Buying opium contrary to law.
5. Selling opium contrary to law.
6. Facilitating in the transportation and concealment of opium contrary to law.

In other words, we have without any question the statement of six distinct and separate offenses contained in each count stated in the conjunctive form. It is to be further noted that under section 387, or the Act of February 9, 1909, chapter 100, 35 Statute Law 614, that the very language as set out in the act and comprising the various offenses is stated in the disjunctive, and that the indictment in this case follows the language of section 2 of the act, using the conjunctive form and charging the defendants with a violation of each and every part of said section. Counsel for the defendant contend that this cannot be done and that there is no authority to the effect that an indictment can be so framed.

In the case of People, appellant, v. Plath, respondent, cited in 166 Cal., page 227, the court on page 229 uses the following language:

> "The indictment before us charged defendant in the conjunctive and in the language of the statute with having on or about * * * As the indictment is drawn, there is no necessary connection between any of the matters so separately charged, and under well settled rules, it would only be necessary for the prosecution to prove, in order to obtain a conviction, that at some time prior to the finding of the indictment the defendant did any one of the things he was alleged to have done. * * *
>
> "* * * The District Court of Appeals in deciding this case said that this blanket form of pleading is not to be commended, but was of the opinion that it was not fatally defective. Of course the

indictment was not fatally defective in the sense that it would be held insufficient to sustain a conviction in the absence of timely objection by demurrer; and it may be that even in the case of the objections urged, if the demurrer had been overruled and a trial had, resulting in conviction, the record on appeal might be such as to satisfy us that the defendant was not prejudiced by the course followed. As to this, we express no opinion, for the question is not before us. The question here is whether the trial court's action in sustaining the demurrer before the trial should be overruled."

Again on page 232, quoting from the opinion of the court, we find:

"We think it is plain that the section was not designed to state a series of acts, all of which taken together should constitute but a single offense, but that it was intended thereby to define at least six separate and distinct offenses and that the situation is precisely the same as it would have been had the subdivisions been enacted as separate sections of our Penal Code, or independent statutes, instead of as subdivisions of a single section, connected with each other by the disjunctive 'or', here as we have seen, defendant was charged in a single indictment and indeed in a single count with having committed the offenses defined in subdivisions 1, 5 and 6, as well as those defined in each of the other subdivisions."

In the case of People v. Lee, 107 Cal. 480, the court said:

"That while many offenses may now be charged, in the strict language of the statute, a defendant

> is still entitled to be apprised with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare his defense and upon acquittal or conviction plead his jeopardy against further prosecution."

It is to be noted that in the first count of the indictment an overt act of some kind is specifically stated against all defendants except the demurring defendants, Proffitt and Hill; that nowhere in the first count or in any other count is there anything to specifically show the connection of Proffitt and Hill with the matters charged therein, except a general allegation or a blanket statement that they either did buy, sell, secrete, facilitate in transportation, receive contrary to law, opium, and as was said in the case of People v. Webber, 138 Cal. 145-149, the Penal Code under section 952 of said code does not relieve prosecuting attorney from the necessity of informing defendant with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare his defense and upon acquittal or conviction plead his jeopardy against further prosecution.

It is urged on behalf of the defendant, Proffitt, no overt act of any kind being stated against him, or no particular circumstances being stated in the indictment, that he was unable to meet the charge as it now exists and was unable to prepare his defense; that the nature and particulars and the circumstance of his connection with the alleged crime as stated in the indictment are not alleged, and it is therefore respect-

fully submitted that the demurrer as to him should have been sustained.

In urging this contention, counsel do not ignore various decisions which have held that where a statute sets forth a number of acts in the disjunctive such as "making or causing to be made," "keeping or causing to be kept," "cutting and removing," "depositing and causing to be deposited," "making and presenting a claim," or

> "obtaining money from the United States by means of fraudulent deeds, powers of attorney, orders, certificates, receipts or other writings,"

indictments alleging the same in the conjunctive have been held good and with good reason, for in each of the cases so decided a reference is made to a particular transaction or deed, whereas in the indictment here under consideration, as was held in the Plath case (cited *supra*), it was intended by Congress that there should be at least seven separate and distinct offenses, designated in section 2 of the Act of January 17, 1914, commonly called the Opium Act, Ch. 10, 38 Stats. at Large, p. 276, which reads as follows:

> "or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such opium, etc."

for the same reasons as alleged in the Plath case.

Assignment No. II is as follows:

The court erred in overruling the objection of the defendant to the questions propounded to the witness Roy B. Holmes, which questions, objections, answers and exceptions are as follows:

"Q. Is that the Baptieste car?

"A. It was, sir.

"Q. Now, who is Baptieste?

"Mr. Dominguez: That is objected to as not cross-examination, as incompetent and immaterial.

"Mr. Lawson: I think it will be very material before we get through, Your Honor.

"The Court: I think it is material. I will overrule the objection.

"A. Well, I can't interpret what you mean by 'who.'

"Q. He was a negro, was he not?

"A. He was a negro that lived somewhere around Central avenue and 10th or 11th street.

"Q. By Mr. Lawson: Now, don't you know that Baptieste was picked up by Proffitt and Hill when he had opium in his possession; that he was taken down to the police station, and that his car was taken away from him and put in your garage?

"Mr. Dominguez: That is objected to as incompetent, irrelevant and immaterial and not proper cross-examination, and I ascribe the question as gross misconduct on the part of the district attorney, the question having but one purpose, and that is to prejudice this jury against the defendant Proffitt on a collateral matter.

* * * * * * * * *

"Q. From whom did you get the car?

"A. Mr. Baptieste or someone called up my office and said their car was in front of a place on Central avenue and wouldn't run, and I says, 'We will be over there as soon as we can.'

"Q. Was Baptieste under arrest at the time?

"Mr. Dominguez: That is objected to as incompetent, irrelevant and immaterial and not cross-examination; and I again ascribe the question of the district attorney as gross misconduct. This question is asked

solely for the purpose of influencing this jury against this defendant Proffitt!"

The grievous injustice from which the defendant suffers under and by reason of this assignment of error will be appreciated by this Honorable Court after having read the testimony of the Chinese witnesses as contained in the bill of exceptions [Tr. pp. 85-200], by whom the Government sought to show that the defendant and another defendant named Hill on the 21st day of February, 1919, at Pasadena (both said defendants being then and there police officers in the city of Los Angeles), pretended to arrest another defendant by the name of Lee Tong, alias Hom Hong, for having opium in his possession, and then and there took from the said defendant, Lee Tong, alias Hom Hong, the sum of four thousand dollars ($4000.00) in money and certain cans of opium and that the defendants, between Pasadena and Los Angeles, released the said Lee Tong, alias Hom Hong, but did not return to him the money or the opium and filed no criminal charge against him.

The assistant United States district attorney, at the trial of this case, offered no evidence to prove that this defendant or any of the other defendants had ever committed any other similar offenses, but in the cross-examination of the witness, Roy B. Holmes, who testified for the defendant, endeavored to get before the jury an accusation to the effect that the defendant and the other said defendant Hill, had pursued exactly the same tactics at some time with a negro named Bap-

tieste. The said assistant district attorney further manifested his intense feeling against the defendant through over-zealousness in endeavoring to convict him, by attempting to and to a large extent actually succeeding in introducing over objections confidential communications that had occurred between the witness, Roy B. Holmes, and his wife, Mrs. Nellie I. Holmes (*the fact that the said incompetent testimony was permitted to be introduced is more thoroughly discussed in the following third assignment of error in this brief*), and in the examination of the said Mrs. Nellie I. Holmes, who appeared as a witness for the Government, the said assistant district attorney asked the said Mrs. Holmes a great many questions pertaining to and concerning the said negro, Baptieste, and his said car. [See Tr. pp. 158 and 159.] That this one assignment of error should cause a reversal in this case should be very apparent to this Honorable Court upon two grounds:

First Ground.

Because it was a deliberate attempt to make a showing before the jury to the effect that the defendant had been guilty of other similar offenses without offering any proof of said offenses and in support of our contention on this point, the attention of this Honorable Court is called to the case of People v. Lee Rial, 23 Cal. App. 713, and to the case of People against James W. Byrnes, 27 Cal. App., p. 79. In these two cases both men were tried for the same offense. Both men had been operating together "fake" pool rooms. In the Rial case evidence of other similar offenses was

introduced and that the other similar offenses *were* offenses was established by competent proof. In the Byrnes case evidence of other similar offenses was introduced but the state was unable to prove that in the other similar offenses the "fake" pool rooms were "fake" pool rooms for the reason that in the Byrnes case the state was unable to locate the exact place where the "fake" pool rooms used in the other similar offenses were located and could therefore not establish the fact that they were not genuine pool rooms receiving bona fide telegraphic reports from some race track, therefore the Rial case was affirmed and the Byrnes case was reversed.

Certainly where no evidence whatever is introduced for the purpose of showing another similar offense, but only an accusation made by the assistant district attorney through his questions, a reversal should be had in this case.

Second Ground.

Because the conduct of the district attorney was such throughout the trial, and particularly was it manifested in these instances, as has repeatedly brought about reversals in this state, notably in the case of People against Mullings, 83 Cal. 138; People against Wells, 100 Cal. 459, and People against Wright, 144 Cal., p. 161, and the court's attention is particularly directed to each of these cases and especially to that portion of the decision in the Wright case beginning at bottom of page 165 (which counsel would quote at length in this brief if time would permit). But the

leading case in this state and one of the leading cases, if not the leading case in the United States, on the subject of misconduct of district attorneys, is found in People against Gorham Tufts, Jr., 167 Cal., p. 266. Closing words in the Tufts case were: "It is to be regretted that prosecuting counsel in the heat of contest and in the desire for victory, sometimes forget that the function of a district attorney is largely judicial, and that he owes to the defendant as solemn a duty of fairness as he is bound to give to the state full measure of earnestness and fervor in the performance of his official obligations. Again and again has this court commented upon the course of prosecutors in this regard, but instances of such conduct are all too common. We have no doubt that in the present case the prosecutor's demeanor and his improper questions deprived the defendant of that fair trial which ought to have been his under the law. For this reason he should not be subjected to the result of a verdict so induced. (Citing People v. Balliere, 127 Cal. 65; People v. Derwae, 155 Cal. 593; People v. Mohr, 157 Cal. 734; People v. Grider, 13 Cal. App. 709.)"

In the Mullings case, in the Wells case, and in the Wright case (cited *supra*), as well as in the Tufts case, the fact that objections were sustained to the improper questions asked by the district attorney, is thoroughly discussed and in each case it is held that the damage was done and the injustice resulted from the improper questions. Therefore on these authorities carefully and conscientiously considered, counsel believes that a reversal should be had in the present

case on this second ground of the second assignment of error, even if there were no other errors complained of.

Assignment No. III is as follows:

The court erred in overruling the objection of the defendant to the questions propounded to the witness Nellie I. Holmes, in reference to a conversation which the witness had with another witness outside the presence of any defendant, which questions, objections, answers and exceptions are as follows:

Question propounded to witness Nellie I. Holmes with reference to conversation and actions of her husband, Roy B. Holmes:

"Q. What did he do when he came home?

"A. Well, he seemed to be terribly excited and—

"Mr. Dominguez: Just a moment: Now, I move to strike that out on the ground it is not responsive.

"The Court: I think it is responsive. Go ahead.

"Mr. Dominguez: Exception. It is hearsay—calling for hearsay.

"Q. By Mr. Lawson: Just proceed, Mrs. Holmes.

"A. He came in and he pulled down all the front curtains—something that never happens only once in six or eight years.

"Mr. Dominguez: Just a moment. I move to strike that out on the ground the same is incompetent, irrelevant and immaterial, without the issues of this case and not binding on either defendant, what Holmes told her.

"The Court: If I remember right, Mr. Dominguez, Mr. Holmes was asked these questions: 'Weren't you excited when you got home?' And, 'Didn't you go in

and pull the curtains down?' and he denied it. Now, if that is so, this evidence is admissible.

* * * * * * * * *

"The Court: The objection will be overruled. Proceed.

"Q. By Mr. Lawson: Just go on now, if there is anything else.

"A. What I mean by 'six or eight years,' I don't think they have ever been pulled down but twice since we were married, and that was twice since this supposed hold-up has happened.

"Mr. Dominguez: I move to strike out the last statement of this witness on the ground that the same is incompetent, irrelevant and immaterial, hearsay, her conclusion and opinion, and ask the court to instruct the jury to disregard that statement.

"The Court: Read the answer.

"The Court: I will overrule the motion to strike out.

"Mr. Dominguez: Exception.

* * * * * * * * *

"Q. Now, I will ask you, Mrs. Holmes, if this conversation did not take place, if not the exact words, in substance?

"Mr. Dominguez: Now, we desire to offer an objection to this question, on the ground that the same is incompetent, irrelevant and immaterial, calling for hearsay evidence outside of the presence of either one of these defendants.

"Mr. Lawson: You understand, Your Honor, this is impeaching testimony.

"The Court: The question you are going to ask her now is the same question you submitted to Mr. Holmes?

"Mr. Lawson: Yes, Your Honor, the same question that was propounded to the witness Holmes. This is purely for the purpose of impeachment.

"The Court: Under those circumstances, Mr. Dominguez, what objection have you got?

"Mr. Dominguez: None. I didn't know his explanation—

"The Court: All right.

"Mr. Dominguez: Of what he intended to do.

"Q. By Mr. Lawson: Mr. Holmes stated, or asked you, Mrs. Holmes, if you remembered a Sunday last February when Mr. Proffitt was at your house, and if you, Mrs. Holmes said, 'Do you mean the Sunday that Hill and Proffitt came while I was taking Hazel to Sunday-school?' Then Mr. Holmes said, 'That is the Sunday that I mean, but Hill was not with Proffitt.' Then you, Mrs. Holmes, said, 'Yes, he was. Don't you remember you told me that that was Hill? And I afterwards told you that Mrs. Merry said, after I described him to her, that he was the same man who came to borrow a gun while we were at Pasadena with the Kesters'. Then Mr. Holmes said to you, Mrs. Holmes, 'No, Hill was not there.' Then you, Mrs. Holmes, said, 'He certainly was.' Then Mr. Holmes said, 'Well, if he was, I didn't know it. I certainly did not see him.' And then Mr. Holmes further said, 'It will be a good thing for you to forget it if you saw him, for Hill is trying to prove that he was sick in bed at the time that they were supposed to have held up those Chinamen.' And then Mr. Holmes further said, 'It may be that you will be called on to be a witness. They had me down there today, and if you are called you just forget that you saw Hill.'

"Now, did that conversation take place between you and Mr. Holmes at that time and place?

"A. Yes, sir.

"Q. In the presence of you and Mr. Holmes?

"A. Yes, sir.

"The Court: She stated the presence.

"Q. By Mr. Lawson: Now, Mrs. Holmes, on the same evening of May 29th, on Thursday night, at your home, in the city of Los Angeles, I will ask you if this conversation did not take place between you and Mr. Holmes, you two being the only parties present at that time. I might further say, did you have a conversation at that time in the house?

"A. Yes, sir.

"Q. I will ask you if this is the conversation that took place at that time: You, Mrs. Holmes, stated to Mr. Holmes that 'You were mixed up with this man Proffitt in opium deals.' And further said, 'Well, I have tried to get you to stay away from them and not mix into police affairs enough, and if you had been at home when you should have been, you would not have had it to say, that is, to testify.' Then Mr. Holmes said, 'I never was mixed up or had anything to do with them.' Then you, Mrs. Holmes, said, 'You certainly did. You seem to know all about that fellow you call Nigger Baptieste.' And then Mr. Holmes said, 'I did not.' Then you, Mrs. Holmes, further said to him, 'Well, I suppose you have forgotten that you told Mr. and Mrs. Schlotzhauer and Mr. and Mrs. Kunkel and myself, that the Nigger's car that the Government was looking for was at your shop, and that they were looking for it all over, and that you knew that there was opium hid in it, and you hadn't looked for it yet, but was pretty sure there was a secret place in the car where the stuff was hid.' Then Mr. Holmes said, 'You are driving me crazy; you always misinterpret things so.' And then Mr. Holmes said to you, 'I told you that the car was in the shop and the Government had looked for it.' Then Mr. Holmes said this to you, 'The car was in the shop, yes, and the Government had looked for it,

but I never mentioned opium.' Then you said to Mr. Holmes, 'You certainly did; and if they ask me to testify, I will ask Grace and Addie, and I bet they will remember it.' And then you further said to Mr. Holmes, 'What about Cockeye Smith? I guess you forget about telling me that you were going to San Diego with the sheriff to get him. And when you got back you told me that you had found him, and had come back by way of Seal Beach, and that you had dinner there about three o'clock; and that you lied to me—you went to San Diego with a couple of women, and I suppose another man.' Then Mr. Holmes said, 'I didn't,' then you said, 'You did.' Then Mr. Holmes said, 'Well, who told you? Addie?' Then you said, 'No, he did not, and it is none of your business who did, but I know you did.' And then Mr. Holmes further said, 'Well, there were two women in the crowd, but they were not with me; they were with the other fellows.' Then you to said to Mr. Holmes, 'I suppose you played chauffeur.' Then Mr. Holmes said, 'Well, you are always picking fights with me. What have I done to bring this on?' Then you said to Mr. Holmes, 'I am not fighting but want you to understand that I won't lie for you or anybody else.' Then Mr. Holmes said, 'I don't want you to, nor nobody asked you to.' Then you said to Mr. Holmes, 'You certainly did just a few minutes ago. You asked me to forget that Mr. Hill was in the car with Mr. Proffitt. I want you to understand that I won't lie. If I am called on to be a witness I will tell the truth if I can remember and be sure, and if I don't remember, I will say so.' Then Mr. Holmes said, 'Well, is there anything good left of me?' And you said to Mr. Holmes, 'Yes, there is. You are the best hearted fellow that ever lived.' And Mr.

Holmes said, 'Is that all?' Then you said, 'When I said that, I mean the bottom of everything. If you would stay at home with your family and go out with decent people and treat my friends as you should everything would go all right every way; but as long as you go with a crowd like you have been, and have nothing to do with your family, you can never expect to be happy, for nobody can make you happy, me or any other woman.' Then Mr. Holmes said, 'Don't worry, there will never be any other woman with me.' Then Mr. Holmes said, 'I only hope that I can fix things inside of thirty days so that my children will never have to go without, and I will get out of the way. There is only one person that I know I can trust, and that is God.' And then you said, 'You had better not be so sure of it, the way you have been living.' Then Mr. Holmes said, 'Nellie, I had a nice surprise for you. Do you know what I am thinking of?' Then you said, 'No.' Then Mr. Holmes said, 'Are you sure?' Then you said, 'Why, yes.' Then Mr. Holmes said, 'Well, I don't know whether to tell you, or not. but believe I will.' Then Mr. Holmes further said, 'I was going to surprise you by putting you in your own home inside of three months from now. I have had a big business proposition offered me, and it is still hanging fire, but if it goes through the least that I will make the first year will be $20,000, and I am still in debt to Charlie Gorton five thousand or seven thousand dollars. I am paying him when I can. And I was going to try to have you in your own home in about three months from now.' Then Mr. Holmes further said he had changed the combination on the safe at the shop, because he couldn't trust Eddie Menier, his foreman, because small amounts of money had been missed, and also a book of Stevens-Duryea parts and a list of Stevens-Duryea owners

which he thought Eddie probably had taken, as he was considering going into business for himself.

"Now, did that conversation take place at that time?

"A. Yes, sir.

"Mr. Dominguez: Just a moment. To which we object on the ground that the same is incompetent, irrelevant and immaterial, calling for hearsay, not tending to prove or disprove any issues in this case, the question asked, and the statement made being purely on collateral matters, and not impeaching or tending to impeach the witness Holmes in any matter to which he testified in this case, bearing upon the issues in the case.

"The Court: Now, if Mr. Holmes had this conversation with this witness, he was interesting himself in the trial of this case, and I think for that reason it is relevant, if that is your only objection.

"Mr. Dominguez: All the objections that I made, if Your Honor please, are in the record. It is incompetent, irrelevant and immaterial and calls for hearsay.

"The Court: The objection will be overruled.

"Mr. Dominguez: Yes, sir. Exception.

"The Court: What is your answer?

"The Witness: Yes, sir.

"Mr. Dominguez: May I at this time, with Your Honor's permission, object to Your Honor's statement that the witness Holmes had an interest in this case?

"The Court: No, I did not say that.

"Mr. Dominguez: Well, pardon me.

"The Court: I said if he stated these things to this witness, it will show that he had interested himself.

"Mr. Dominguez: Pardon me, then, if Your Honor please.

"The Court: That he had interested himself in this case.

"Mr. Lawson: You may cross-examine."

Perhaps the most grievous injustice inflicted upon this defendant was that complained of in this third assignment of error, wherein he was compelled to suffer a conviction that could not but have been caused in very large measure by the introduction of incompetent testimony, for no one may read the testimony of the witness Roy B. Holmes without realizing and appreciating the importance and value of his testimony to the defendant, yet the assistant district attorney in cross-examination [Tr. pp. 138, 139, 140, 141, 147, 148, 149, 150] asked this witness a great many questions concerning conversations that had occurred between him and his wife, Nellie I. Holmes, that by the very nature of the questions showed the confidential character of the communications concerning which he was being interrogated. Then the district attorney put the wife of Roy B. Holmes, to-wit: Nellie I. Holmes, on the stand as a witness [see Tr. p. 153 *et seq.*] and she was permitted to answer over objection of the defendant concerning these very confidential communications and to relate them as they occurred.

Subdivision 1 of section 1881 of the Code of Civil Procedure of the state of California reads as follows:

> "1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or after-

ward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other; or in an action brought by husband or wife against another person for the alienation of the affections of either husband or wife or in an action for damages against another person for adultery commited by either husband or wife."

Under this subdivision of this section, a decision was rendered in the case of People v. Henry Mullings, cited *supra,* 83 Cal. 138, wherein it is held that the word "incompetent" is sufficiently broad to include the ground of objection and the case of People v. Warner, 117 Cal. 637 is to the same effect, while in the case of Humphrey v. Pope, 1 Cal. App. 374, on pages 377 and 378, the court said:

"It has been repeatedly held that where evidence objected to is absolutely incompetent, the general objection is sufficient. (Nightingale v. Scannell, 18 Cal. 324; Swan v. Thompson, 124 Cal 196; Spelling on New Trial, Section 288.) * * * We can also understand why the specific objection that particular communications between attorney and client, physician and patient, priest and penitent, were privileged, must be urged. But the lips of both husband and wife are forever sealed as to all communications between them during the marital relation, unless consent is shown or the cause of action falls within the exceptions. Neither spouse can be *examined as to*

such communications, without the consent of the other, and in our opinion the evidence is incompetent unless this consent is shown."

In this case the court follows the quotations just cited from its opinion by a discussion of the Mullings case and the Warner case cited *supra,* and adds:

> "In other cases the *evidence* is spoken of as competent or incompetent. (Hanson v. Sutter St. Ry. Co., 116 Cal. 116; *In re* Mullen, 110 Cal. 254.)"

In the same decision, the court says:

> "The reason of the rule requiring specific objections in said cases is entirely wanting here. The relation being shown, the law absolutely prohibited the examination of the wife touching communication during coverture. (Jones on Evidence, sections 751, 754 and 764). The questions were therefore objectionable from every standpoint and in such case specific objection is not demanded. 'There is no reason for it and where the reason is not present the rule fails.' (Swan v. Thompson, 124 Cal. 196)."

The attention of this Honorable Court is called to Jones' Commentaries on Evidence, by L. Horwitz, Vol. IV, published by the Bancroft Whitney Company in 1914 at page 400, Sec. 733 (751) and the lengthy discussion which follows, covering more than one hundred pages. The able discussion in Jones on Evidence cited *supra,* and the many decisions cited therein, can certainly leave no ground for doubt as to the correctness of the rulings of the California courts above cited.

Assignments Nos. IV, V, VI, VII, VIII and IX are referred to [Tr. pp. 217, 218]; the only argument presented in this brief in connection therewith is made in connection with Assignment No. VI, "The court erred in rendering its judgment in this cause against this defendant for the reason that the testimony did not show or tend to show that the defendant had committed any offense set out or attempted to be set out in the indictment."

Assignment No. VII, "The court erred in rendering its judgment in this cause against the defendant for the reason that the testimony introduced at the trial of said cause did not tend to connect the defendant with the commission of any offense set out in the indictment."

In support of these two assignments, the attention of this Honorable Court is called to the testimony as contained in the transcript on appeal, pages 85 to 200, where the only testimony given by any of the witnesses against this defendant at the most only showed his presence and no guilty act or knowledge on his part in any of the transactions alleged to be violations of law.

We Call the Court's Attention to the Recent Amendment of Section 269 of the Judicial Code, Which, Since the Act of February 26, 1919, Reads as Follows:

> "On the hearing of any appeal, *certiorari,* writ of error or motion for new trial in any case, civil or criminal, the court shall give judgment after

an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

Under this amendment we desire to call the attention of this Honorable Court to the instruction given in this case on the subject of accomplices as contained on pages 69 and 70, transcript of record.

"There are certain rules of law applicable to the testimony of accomplices, which it is proper for the court to give you in charge, and, in doing this I shall adopt the language which has heretofore received judicial sanction.

"An accomplice is a person who, knowingly and voluntarily, and with common intent with the principal offender, unites in the commission of an offense. Whether the testimony of an accomplice be true or false, is a question which, like all controverted question of fact, is submitted solely to your determination. It is not within the province of the court to pass upon controverted questions of fact, or upon questions affecting the credibility of witnesses. But it is the duty of the court to call your attention to certain rules which obtain in courts of justice in reference to these persons known in law as 'accomplices.' On this point you are instructed that a particeps criminis,—that is, an accomplice,—notwithstanding the turpitude of his conduct, is not on that account an incompetent witness. It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the Government has a right to use him as a witness. It is the duty of the court to admit his testimony, and that of the jury to consider it. The testimony of an

accomplice is, however, always to be received with caution, and weighed and scrutinized with great care by the jury; and it is usual for courts to instruct juries,—and you are instructed in this case,—that you may disregard the evidence of an accomplice unless he is confirmed and corroborated in some material parts of his evidence connecting the defendants with the crime, by unimpeachable testimony. But you are not to understand by this that he is to be believed only in such parts as are thus confirmed, which would be virtually to exclude him, inasmuch as the confirmatory evidence proves, of itself, those parts to which it applies. If he is confirmed in material parts connecting the defendants on trial with the offenses charged in the indictment, he may be credited in others; and the jury will decide how far they will believe a witness from the confirmation he receives by other evidence; from the nature, probability, and consistency of his story; from his manner of delivering it, and the ordinary circumstances which impress the mind with its truth.

"If you should believe from the evidence that any witness who was called by the defendants and testified in their behalf was an accomplice in the commission of the crime or crimes charged in the indictment, then the same rules I have stated to you as being applicable to such witnesses called for the Government are alike applicable to such witnesses called for the defense."

We do not believe that this is the true law with regard to the testimony of accomplices; as we understand it, in the state of California the true law is set forth in the case of Stone v. State, as reported in the American State Reports, Vol. 98 (note), page 169, as follows:

"A test is suggested in Welden v. State, 10 Tex. App. 400, and the same is approved by the Supreme Court of California in the recent case of People v. Morton, 139 Cal. 719, 73 Pac. 609. The following is an extract of the opinion of the Texas case: 'In order to convict the defendant upon the testimony of an accomplice, there must be other evidence tending to connect the defendant with the offense. The accomplice must be corroborated by the evidence of some other witness, and this corroboration must be by proof of some fact tending to connect the defendant with the commission of the offense. The accomplice may state any number of facts, and these facts may be corroborated by the evidence of other witnesses; still, if the facts thus corroborated do not tend to connect the defendant with the crime, or if they do not point pertinently to the defendant as the guilty party, or as a participant, this would not be such a corroboration as is required by the code. We suggested this mode as a proper test: Eliminate from the case the evidence of the accomplice, and then examine the evidence of the other witness or witnesses with a view to ascertain if there be inculpatory evidence—evidence tending to connect the defendant with the offense. If there is, the accomplice is corroborated; if there is no inculpatory evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him.' See, too, People v. Ames, 39 Cal. 403."

Still further in support of our contention that this is the true rule, we call attention to the case of People

v. Robbins, 171 Cal. 466, and that our contention in this regard is sound, we believe, is sustained by the able discussion in Vol. 1, Ruling Case Law, page 168, and 169.

In closing this brief, we respectfully submit that if the evidence of those who were accomplices in the crime committed, if a crime was committed, is excluded, there is absolutely no evidence tending to connect this defendant with the commission of any offense.

Respectfully submitted,

FRANK E. DOMINGUEZ,
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WILL H. WILLIS,
WILLIAM THOMAS HELMS,
Attorneys for Plaintiff in Error.

No. 3418

3

United States
Circuit Court of Appeals
For the Ninth Circuit.

THEODORE KAPHAN,
Plaintff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For Defendant and Plaintiff in Error (Theodore Kaphan):

HENRY M. OWENS and HARRY K. WOLFF, S. F., Calif.

For Plaintiff and Defendant in Error:

UNITED STATES ATTORNEY, San Francisco, Calif.

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND, and THEODORE KAPHAN,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of said Court:

Sir: Please prepare transcript on writ of error and include therein the following papers:

Indictments; demurrers to indictments, and all minute orders pertaining thereto; pleas to indictments; minutes of trial; verdict; all minute orders subsequent to the trial; motion for a new trial; affidavit on motion for new trial; motion in arrest of

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judgment; judgment; petition for writ of error; assignment of errors; order allowing writ of error; bill of exceptions; affidavit of service of affidavit on motion for new trial; affidavit of service on motion for new trial; affidavit of service on the motion in arrest of judgment; affidavit of service on assignment of errors; affidavit of service on petition for writ of error; affidavit of service of order allowing writ of error; all orders extending time to docket record on appeal; original writ of error, and original citation.

Dated this 16th day of October, 1919.

HENRY M. OWENS,
HARRY K. WOLFF,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed Oct. 17, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

(Indictment—No. 6272.)

Viol. Sec. 37, C. C. U. S.

At a stated term of said Court begun and holden at the City and County of San Francisco, within and for the Southern Division of the Northern District of California, on the second Monday of July in the year of our Lord one thousand nine hundred and seventeen,

*Page-number appearing at foot of page of original certified Transcript of Record.

The Grand Jurors of the United States of America, within and for the Division and District aforesaid, on their oaths, present: THAT

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS PRESELEY A. McFARLAND and THEODORE KAPHAN,

hereinafter called the defendants, heretofore, to wit, during the month of October in the year of our Lord, one thousand nine hundred and sixteen, in the Southern Division of the Northern District of California, and within the jurisdiction of this Honorable Court, did wilfully, knowingly, unlawfully and feloniously conspire, combine, confederate and agree together, with, between, and among themselves and divers other persons whose names are to the Grand Jurors aforesaid, unknown, to commit certain offenses against the United States, that is to say:

They, the said Harry A. Akers, Lee Yow, Rulob W. Hendricks, Preseley A. McFarland, and Theodore Kaphan, did, at the times and places referred to in this indictment, wilfully, knowingly, unlawfully and feloniously conspire, combine, confederate and agree together, with, between, and among themselves and divers other persons, whose names are to the Grand Jurors aforesaid, unknown, to wilfully, knowingly, unlawfully, and feloniously bring into and cause to be brought [2] into, and aid and abet the bringing into and landing in the United States by sea, or otherwise, through the Port at San Francisco, in the Southern Division of the Northern District of California, from the Republic of China, certain Chinese persons, whose names are to the

Grand Jurors aforesaid, unknown, who, as the said defendants herein, then and there, and at all of the times referred to in this indictment, well knew were not then and there, or at any of the times referred to in this indictment, entitled to enter or remain in the United States.

That said conspiracy, combination, confederation and agreement, with, between, and among the said defendants and the said divers other persons, whose names are to the Grand Jurors aforesaid, unknown, was in existence and effect and in process of execution continuously throughout all of the times referred to heretofore or hereinafter in this indictment.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the object thereof, the said defendant, Lee Yow, did, during the month of October in the year of our Lord one thousand nine hundred and sixteen, at San Francisco, in the Southern Division of the Northern District of California, deliver to the said defendant, Harry A. Akers, certain letters addressed to Chinese applicants for admission to the United States of America, awaiting examination to enter the United States of America at the Immigration Station at Angel Island, California, and that said letters contained questions and answers to be used by said applicants as a means of gaining admission to the United States of America.

And to further effect the object of said conspiracy,

[3] combination, confederation and agreement, the said defendant, Harry A. Akers, did, during the month of October, in the year of our Lord one thousand nine hundred and sixteen, within said Division and District, deliver said letters to the said defendant, Rolub W. Hendricks, and upon receipt of said letters from the said defendant, Harry A. Akers, the said defendant, Rolub W. Hendricks, did, during the month of October, in the year of our Lord one thousand nine hundred and sixteen, at the Immigration Station at Angel Island, California, Division and District aforesaid, deliver said letters to certain Chinese applicants for admission to the United States of America.

And to further effect the object of said conspiracy, combination, confederation and agreement, the said defendant, Lee Yow, did, during the month of October, in the year of our Lord, one thousand nine hundred and sixteen, within the Division and District aforesaid, pay to the said defendant, Harry A. Akers, the sum of forty-five dollars ($45.00), and that thereupon, the said defendant, Harry A. Akers, paid to the said defendant, Rolub W. Hendricks, within said Division and District, the sum of twenty dollars ($20.00).

And to further effect the object of said conspiracy combination, confederation and agreement, the said defendant, Preseley A. McFarland, did, during the month of October, in the year of our Lord one thousand nine hundred and sixteen, at the Immigration Station at Angel Island, California, Division and District aforesaid, abstract from the files of the

Record Room of the said Immigration Station at Angel Island, California, the official files of certain Chinese persons, to wit: Chin Bow Chee, ex SS. "Siberia," June 29, 1915, Chin Wah Ung, ex SS. "Manchuria," December 4, 1910, and Chin Ping Po, ex SS. "Hong Kong Maru," October 21, 1899, belonging to the Government of the United States of America, and then [4] and there deliver said files to the said defendant, Rolub W. Hendricks, within the said Division and District, at the Immigration Station at Angel Island, California.

And to further effect the object of said conspiracy, combination, confederation and agreement, the said defendant, Rolub W. Hendricks, did, during the month of October, in the year of our Lord one thousand nine hundred and sixteen, in San Francisco, California, Division and District aforesaid, deliver said records belonging to the Government of the United States of America, to the said defendant, Theodore Kaphan.

AGAINST the peace and dignity of the United States of America, and contrary to the statute of the said United States of America, in such case made and provided.

JOHN W. PRESTON,
United States Attorney.

[Endorsed]: A True Bill. Harry L. Tevis, Foreman, Grand Jury. Presented in open court and filed Oct. 19, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk [5]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

(Indictment—No. 6273.)

At a stated term of said court begun and holden at the City and County of San Francisco, within and for the Southern Division of the Northern District of California, on the second Monday of July in the year of our Lord one thousand nine hundred and seventeen,

The Grand Jurors of the United States of America, within and for the Division and District aforesaid, on their oaths, present: THAT

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND and THEODORE KAPHAN,

hereinafter called the defendants, heretofore, to wit, during the month of October in the year of our Lord one thousand nine hundred and sixteen, in the Southern Division of the Northern District of California, and within the jurisdiction of this Honorable Court, did wilfully, knowingly, unlawfully and feloniously conspire, combine, confederate and agree together, with, between, and among themselves and divers other persons, whose names are to the Grand Jurors aforesaid, unknown, to commit certain offenses against the United States, that is to say:

They, the said Harry A. Akers, Lee Yow, Rolub W. Hendricks, Preseley A. McFarland, and Theodore Kaphan, did, at the times and places referred to

in this indictment, wilfully, knowingly, unlawfully and feloniously conspire, combine, confederate and agree together, with, between, and among themselves and divers other persons, whose names are to the Grand Jurors aforesaid, unknown, to wilfully, knowingly, unlawfully, and feloniously conceal, remove, mutilate, obliterate, and destroy, records, papers, and other documents filed and deposited in a public office to wit, the [6] Immigration Office at Angel Island, California.

That said conspiracy, combination, confederation and agreement with, between, and among the said defendants and the said divers other persons, whose names are to the Grand Jurors aforesaid, unknown, was in existence and effect and in process of execution continuously throughout all of the times referred to heretofore or hereinafter in this indictment.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present that in furtherance of said conspiracy, combination, confederation and agreement, and to effect and accomplish the objects thereof, the said defendant Lee Yow, did, during the month of October in the year of our Lord one thousand nine hundred and sixteen, at San Francisco, California, in the Southern Division of the Northern District of California, deliver to the said defendant Harry A. Akers certain letters addressed to Chinese applicants for admission to the United States of America awaiting examination to enter the United States of America at the Immigration Station, Angel Island, California, and that said letters contained

questions and answers to be used by said applicants as a means of gaining admission to the United States of America.

And to further effect the object of said conspiracy, combination, confederation and agreement, the said defendant, Harry A. Akers, did, during the month of October in the year of our Lord one thousand nine hundred and sixteen, within the said Division and District, deliver said letters to the said defendant, Rolub W. Hendricks, and upon receipt of said letters from the said defendant, Harry A. Akers, the said defendant, Rolub W. Hendricks did, during the month of October in the year of our Lord one thousand nine hundred and sixteen, within said Division and District, at the Immigration Station at Angel Island, California, deliver said letters to certain [7] Chinese applicants for admission to the United States of America.

And to further effect the object of said conspiracy, combination, confederation and agreement, the said defendant, Lee Yow, did, during the month of October in the year of our Lord one thousand nine hundred and sixteen, within said Division and District, pay to the said defendant, Harry A. Akers, the sum of forty-five dollars ($45.00), and that, thereupon, the said defendant, Harry A. Akers, paid to the said defendant, Rolub W. Hendricks, within said Division and District, the sum of twenty dollars ($20.00).

And to further effect the object of said conspiracy, combination, confederation and agreement, the said defendant, Preseley A. McFarland, did, during the

month of October in the year of our Lord one thou-
and filed Oct. 19, 191. W. B. Maling, Clerk. By
sand nine hundred and sixteen, within said Division and District, at the United States Immigration Station at Angel Island, California, abstract from the files of the Record Room of the Immigration Station at Angel Island, California, the official files of the Government of the United States of certain Chinese persons, to wit, Chin Bow Chee, ex SS. "Siberia," June 29, 1915, Ching Wah Ung, ex SS. "Manchuria," Dec. 4, 1910, and Chin Ping Po, ex SS. "Hong Kong Maru," Oct. 21, 1899, belonging to the Government of the United States of America, and then and there delivered said files to the said defendant, Rolub W. Hendricks, within the said Division and District, at the Immigration Station at Angel Island, California.

And to further effect the object of said conspiracy, combination, confederation and agreement, the said defendant, Rolub W. Hendricks, did, during the month of October in the year of our Lord one thousaid nine hundred and sixteen, in San Francisco, California, within said Division and District, [8] deliver said records belonging to the Government of the United States of America, to the said defendant, Theodore Kaphan.

AGAINST the peace and dignity of the United States of America and contrary to the statute of the said United States of America in such case made and provided.

JOHN W. PRESTON,
United States Attorney.

[Endorsed]: A True Bill. Harry L. Tevis, Foreman, Grand Jury. Presented in open court and filed Oct. 19, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [9]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 6272.

THE UNITED STATES

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND and THEODORE KAPHAN.

Demurrer to Indictment on Behalf of Theodore Kaphan.

Now comes the defendant, Theodore Kaphan, and demurs to the indictment herein and, for ground of demurrer, avers as follows:

I.

That said indictment does not set forth facts sufficient to constitute a public offense against the laws of the United States, or any public offense whatsoever.

II.

That said indictment does not set forth facts sufficient to constitute a violation of Section 37 of the Criminal Code of the United States or of any other

section of said Criminal Code or of any other law of the United States.

III.

That said indictment does not set forth facts sufficient to constitute any conspiracy to wilfully, knowingly, unlawfully, and feloniously bring into and cause to be brought into, and aid and abet the bringing into and landing in the United States by sea, or otherwise, or at all, through the port of San Francisco, in the Southern Division of the Northern District of California, or through any other port or place, from the Republic of China [10] or from any other place, certain, or any, Chinese persons, who were not entitled to enter or remain in the United States.

IV.

That said indictment is uncertain in that it cannot be ascertained therefrom how or in what way any of said alleged overt acts committed by any of said defendants were in furtherance of any conspiracy or would effect and accomplish the object thereof.

V.

That said indictment is unintelligible for the same reasons urged in paragraph IV.

VI.

That said indictment is ambiguous for the same reasons urged in paragraph IV.

VII.

That said indictment is uncertain in that it cannot be ascertained therefrom how or in what manner the object of said alleged conspiracy was fur-

thered or effected by alleged fact that one of said defendants, to wit: Rolub W. Hendricks, did during the month of October, 1916, or at any other time, in San Francisco or elsewhere, deliver said or any records belonging to the Government of the United States to the said defendant, Theodore Kaphan.

VIII.

That said indictment is unintelligible for the same reasons urged in paragraph VII.

IX.

That said indictment is ambiguous for the same reasons urged in paragraph VII.

WHEREFORE, said defendant Theodore Kaphan prays the judgment of this Honorable Court that the indictment against [11] him be dismissed and that he be permitted to go hence without day.

MARSHALL B. WOODWORTH.
HARRY K. WOLFF.

Marshall B. Woodworth and Harry K. Wolff hereby certify that said demurrer is not interposed for delay and that they believe that the points at law therein raised are good as matter of law.

MARSHALL B. WOODWORTH.
HARRY K. WOLFF,

Recd. a copy of within demurrer this 27th day of October, 1917.

CASPER A. ORNBAUN,
Asst. U. S. Dist. Atty.

[Endorsed]: Filed Oct. 27, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [12]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 6273.

THE UNITED STATES

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND and THEODORE KAPHAN.

Demurrer to Indictment on Behalf of Theodore Kaphan.

Now comes the defendant, Theodore Kaphan, and demurs to the indictment herein and, for ground of demurrer, avers as follows:

I.

That said indictment does not set forth facts sufficient to constitute an offense against the laws of the United States.

II.

That said indictment does not set forth facts sufficient to constitute a violation of Section 37 of the Criminal Code of the United States or of any other section of said Criminal Code or of any other law of the United States.

III.

That said indictment does not set forth facts sufficient to constitute any conspiracy to violate any of the provisions of Section 128 of the Criminal Code of the United States or of any other section of said

Criminal Code or of any other law of the United States.

IV.

That said indictment is uncertain in that it cannot be ascertained therefrom how or in what way any of said alleged overt acts committed by any of said defendants were in furtherance [13] of any conspiracy or would effect and accomplish the object thereof.

V.

That said indictment is unintelligible for the same reasons urged in paragraph IV.

VI.

That said indictment is ambiguous for the same reason urged in paragraph IV.

VII.

That said indictment is uncertain in that it cannot be ascertained therefrom:

(a) Whether said immigration office at Angel Island, California, is a public office within the meaning of the law;

(b) Whether said letters, official files referred to in said indictment are public records within the meaning of the law;

(c) Whether said letters and official files were ever filed or deposited in any public office;

(d) What said official files consisted of;

(e) Whether the act of abstracting from the files of the record room of the immigration station at Angel Island, California, certain official files of the Government of the United States of certain Chinese

persons referred to in said indictment constituted any violation of Section 128 of the Criminal Code of the United States or of any other law of the United States.

VIII.

That said indictment is unintelligible for the same reasons urged in paragraph VII.

IX.

That said indictment is ambiguous for the same reasons urged in paragraph VII.

WHEREFORE, said defendant Theodore Kaphan prays the judgment of this Honorable Court that the indictment against [14] him be dismissed and that he be permitted to go hence without day.

MARSHALL B. WOODWORTH.
HARRY K. WOLFF,

Marshall B. Woodworth and Harry K. Wolff hereby certify that said demurrer is not interposed for delay and that they believe that the points at law therein raised are good as matter of law.

MARSHALL B. WOODWORTH.
HARRY K. WOLFF,

Recd. a copy of within demurrer this 27th day of October, 1917.

CASPER A. ORNBAUN,
Asst. U. S. Dist. Atty.

[Endorsed]: Filed Oct. 27, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 27th day of October, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable EDWARD S. FARRINGTON, Judge.

No. 6272.

UNITED STATES OF AMERICA

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND and THEODORE KAPHAN.

Minutes of Court—October 27, 1917—Arraignment, Plea and Order Overruling Demurrer.

This case came on regularly this day for the arraignment of defendant Theodore Kaphan upon the Indictment herein against him. Said defendant was present in court with his attorney, Marshall B. Woodworth, Esq. On motion of C. A. Ornbaun, Esq., Assistant United States Attorney, and on order of Court, said defendant was duly arraigned upon the indictment herein against him and stated his true name to be as contained therein. Thereupon Mr. Woodworth presented and filed a demurrer to the indictment herein on behalf of said defendant, which demurrer the Court ordered and the same is hereby overruled. Defendant was then

called to plead and plead not guilty of the offense charged in said indictment, which plea the Court ordered and the same is hereby entered. [16]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 27th day of October, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable EDWARD S. FARRINGTON, Judge.

No. 6273.

UNITED STATES OF AMERICA

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND and THEODORE KAPHAN.

Minutes of Court—October 27, 1917—Arraignment, Plea and Order Overruling Demurrer.

This case came on regularly this day for the arraignment of defendant Theodore Kaphan upon the Indictment herein against him. Said defendant was present in court with his attorney, Marshall B. Woodworth, Esq. On motion of C. A. Ornbaun, Esq., Assistant United States Attorney, and on order of Court, said defendant was duly arraigned upon the indictment herein against him and stated his true name to be as contained therein. Thereupon Mr. Woodworth presented and filed a de-

murrer to the indictment herein on behalf of said defendant, which demurrer the Court ordered and the same is hereby overruled. Defendant was then called to plead and plead not guilty of the offense charged in said indictment, which plea the Court ordered and the same is hereby entered. [17]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 12th day of November, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable M. T. DOOLING, Judge.

No. 6272.

UNITED STATES OF AMERICA

vs.

HARRY A. AKERS et al.

Minutes of Court—November 12, 1918—Trial.

This case came on regularly this day for the trial of defendants, Rolub W. Hendricks, Preseley A. McFarland and Theodore Kaphan, and for arraignment of defendant, Harry A. Akers. Each of said defendants was present in court, and defendant, Theodore Kaphan, was present with attorneys, H. K. Wolff, Esq., and H. W. Owens, Esq. Mrs. A. A. Adams, United States Attorney was present for and on behalf of the United States. Marshall B. Wood-

worth, Esq., attorney for defendant, Lee Yow, moved the Court for severance of trial as to said defendant, Lee Yow, and called Dr. G. F. Brackett, who was duly sworn and examined in that behalf. Mrs. Adams called Dr. J. P. Hickey, who was duly sworn and examined on behalf of the United States. After hearing the respective attorneys, the Court ordered that said motion for severance as to said defendant, Lee Yow, be and the same is hereby granted. Defendant, Harry A. Akers, was duly arraigned upon the Indictment herein against him, stated his true name to be as contained therein waived formal reading thereof, and thereupon plead "Guilty" of the offense charged, which plea the Court ordered and the same is hereby entered, and this case continued to November 18, 1918, for pronouncing of judgment upon said defendant, Harry A. Akers. After hearing Mrs. Adams, the Court granted defendants, Rolub W. Hendricks and Preseley A. McFarland, leave to withdraw pleas of [18] "Not Guilty" heretofore entered herein, and accordingly each of said defendants, Rolub Hendricks and Presely A. McFarland, withdrew said pleas, and plead "Guilty" of the charge contained in the indictment herein against them, which pleas the Court ordered and the same are hereby entered, and this case continued to November 18, 1918, for pronouncing of judgment upon said defendants, Rolub Hendricks and Preseley A. McFarland. After hearing the respective attorneys, the Court ordered that the trial of defendant Theodore Kaphan, upon the indictment herein be and the same is hereby consolidated with the case of

the United States of America vs. Harry A. Akers et al., No. 6273. [19]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 12th day of November, in the year of our Lord one thousand nine hundred and eighteen. Present: The Honorable M. T. DOOLING, Judge.

No. 6273.

UNITED STATES OF AMERICA

vs.

HARRY A. AKERS et al.

Minutes of Court—November 12, 1918—Trial.

This case came on regularly this day for the trial of defendants, Rolub W. Hendricks, Preseley A. McFarland and Theodore Kaphan, and for arraignment of defendant, Harry A. Akers. Each of said defendants was present in court, and defendant, Theodore Kaphan, was present with attorneys, H. K. Wolff, Esq., and H. W. Owens, Esq. Mrs. A. A. Adams United States Attorney, was present for and on behalf of the United States. After hearing Mrs. Adams, the Court granted defendants, Rolub Hendricks and Preseley A. McFarland, leave to withdraw pleas of "Not Guilty" heretofore entered, and accordingly said defendants, Rolub Hendricks and Preseley A. McFarland, withdrew said pleas and

plead "Guilty" of the offense charged herein, which pleas the Court ordered and the same are hereby entered, and that this case be continued to November 18, 1918, for pronouncing of judgment upon said defendants, Rolub Hendricks and Preseley A. McFarland. Defendant, Harry A. Akers, was duly arraigned upon the indictment filed herein, stated his true name to be as contained therein, waived formal reading thereof, and thereupon plead "Guilty" of the offense charged therein, which plea the Court ordered and the same is hereby entered, and that this case be continued to November 18, 1918, for pronouncing of judgment upon said defendant, Harry A. Akers. On motion of Marshall B. Woodworth, Esq., attorney for defendant, [20] Lee Yow, and after hearing Mrs. Adams, the Court ordered that a severance of trial of defendant, Lee Yow, be and the same is hereby granted. After hearing the respective attorneys, the Court ordered that the trial of defendant, Theodore Kaphan, proceed and that the jury-box be filled from the regular panel of trial jurors of this court. Accordingly the hereinafter named persons were duly drawn by lot, sworn and examined, etc., as follows: Henry W. Eisert, peremptorily challenged by the United States and excused; William Clack, accepted; J. B. Campbell, peremptorily challenged by defendant and excused; Peter J. Kelly, accepted; Edward H. Kemp, peremptorily challenged by defendant and excused; Geo. T. Kolham, accepted; Wm. J. Barbour, peremptorily challenged by defendant and excused; Richard Jose and Harry S. Scott, peremp-

torily challenged by the United States and excused; Paul Odermatt and A. R. Morrow, accepted; Thos. P. Andrew, peremptorily challenged by the United States and excused; Watson H. Malott, W. A. Frederick, Chas. M. Gunn and Geo. E. Hart, accepted; Richard E. Hartler, peremptorily challenged by the defendant and excused; Ferdnand Toklas, peremptorily challenged by the United States and excused; Wm. B. Goode, accepted; J. A. Ramsey, peremptorily challenged by defendant and excused; R. H. Doane and M. Savannah, accepted. Thereupon twelve (12) persons having been accepted as jurors to try said defendant were accordingly sworn, to wit:

William Clack,	W. A. Frederick,
Peter J. Kelly,	Chas. M. Gunn,
Geo. T. Kilham,	Geo. E. Hart,
Paul Odermatt,	Wm. B. Goode,
A. R. Morrow,	R. H. Doane,
Watson H. Malott,	M. Savannah.

Mrs. Adams made statement to the Court and jury as to the nature of the case and called Robert T. Fergusson, William J. Armstrong and Preseley A. McFarland, each of whom was duly sworn and examined on behalf of the United States. Mrs. Adams presented one package of four records and one package of three records, which were ordered filed and marked United States Exhibits Nos. 1 and 2 [21] respectively for Identification, and an Immigration Record which was introduced in evidence, filed and marked United States Exhibit No. 3. The hour of adjournment having arrived, the Court after ad-

monishing the jurors herein, ordered that the further trial of this case be continued to November 13, 1918, at 10 o'clock A. M., and that all parties be and appear accordingly. [22]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 13th day of November, in the year of our Lord, one thousand nine hundred and eighteen. Present: The Honorable M. T. DOOLING, Judge.

No. 6273.

UNITED STATES OF AMERICA

vs.

THEODORE KAPHAN et al.

Minutes of Court—November 13, 1918—Trial (Continued).

This case, consolidated with case of United States of America vs. Theodore Kaphan et al., No. 6272, came on regularly for the further trial thereof. Theodore Kaphan was present in court with attorneys, H. K. Wolff and H. M. Owens, Esqs. Mrs. A. A. Adams, United States Attorney, was present on behalf of the United States. The jury heretofore impaneled and sworn to try said defendant was present and complete. Mrs. Adams called Harry A. Akers, Rolub W. Hendricks and Edward White, who were each duly sworn and examined on behalf

of the United States, and introduced in evidence United States Exhibit No. 2 for Identification, which was marked United States Exhibit No. 4, and rested case of the United States. Mr. Wolff called J. B. Densmore, who was duly sworn and examined on behalf of defendant, and recalled Edward White, who was duly sworn and examined on behalf of defendant, and then called Theodore Kaphan and Mrs. Mary E. Kaphan, each of whom was duly sworn and examined on behalf of defendant, and introduced in evidence certain exhibits which were filed and marked defendant's exhibits "B" (Discharge U. S. A.) and "C' (Note), and rested case of defendant. Mrs. Adams introduced in evidence on behalf of the United States, United States Exhibit No. 1 for Identification as United States Exhibit No. 5, and rested. The case was then argued by Mrs. Adams, Mr. Wolff and Mr. Owens and submitted, whereupon the Court proceeded to instruct the jury herein, who, after being so instructed retired at 5:15 o'clock P. M. to deliberate upon a verdict, and subsequently [23] returned into court at 5:50 o'clock P. M., and upon being called all twelve (12) jurors answered to their names, and in answer to question of Court, stated that they had agreed upon a verdict in each of the above cases, and presented two written verdicts, which the Court ordered filed and recorded, viz: United States of America vs. Theodore Kaphan, No. 6272: "We, the Jury, find Theodore Kaphan, the defendant at the bar Guilty as charged. Geo. T. Kilham, Foreman"; and United States of America vs. Theodore Kaphan, No. 6273: "We, the

Jury, find Theodore Kaphan the defendant at the bar Guilty as charged. Geo. T. Kilham Foreman." Thereupon the Court ordered that the jurors herein be excused from attendance upon the court until November 14, 1918, at 10 o'clock, except jurors, T. H. Doane and M. Savannah and they are excused until November 19, 1918, at 10 o'clock A. M., and juror A. R. Morrow is hereby excused until November 18, 1918, at 10 o'clock A. M. Further ordered that this case be continued to November 16, 1918, for pronouncing of judgment upon said defendant, Theodore Kaphan. [24]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 6272.

UNITED STATES OF AMERICA

vs.

HARRY A. AKERS et al.

Verdict.

We, the jury, find Theodore Kaphan, the defendant at the bar, Guilty as charged.

GEORGE T. KILHAM,
Foreman.

[Endorsed]: Filed Nov. 13, 1918, at 5 o'clock and 50 minutes P. M. W. B. Maling Clerk. By T. L. Baldwin, Deputy Clerk. [25]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 6273.

THE UNITED STATES OF AMERICA

vs.

HARRY A. AKERS et al.

Verdict.

We, the jury, find Theodore Kaphan, the defendant at the bar, Guilty as charged.

GEORGE T. KILHAM,
Foreman.

[Endorsed]: Filed Nov. 13, 1918, at 5 o'clock and 50 minutes P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [26]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

THE UNITED STATES OF AMERICA

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND, and THEODORE KAPHAN.

Motion for New Trial.

Now comes the defendants Theodore Kaphan, through his attorneys, and moves the Court for a new

trial and in support thereof, urges the following grounds:

1. That the verdict is against and contrary to the evidence.

2. That the verdict is not supported by the evidence and that the evidence is insufficient to support the verdict.

3. That the verdict is against law.

4. That the Court committed manifest errors during the trial of the case, which were duly and regularly excepted to by the defendant, as follows:

(a) The Court committed manifest errors in admitting evidence against this defendant over the objection and exception, and in refusing to admit evidence over the objection and exception duly and regularly taken;

(b) The Court committed manifest error in its instructions to the jury;

(c) The Court committed manifest error in refusing to instruct the jury as requested by the defendant in his written instructions theretofore submitted to the Court for its consideration;

(d) The Court committed manifest error in modifying certain of the instructions requested by the defendant and in giving said instructions as modified to the jury;

(e) That new evidence has been discovered material to the [27] defendant, which he could not with reasonable diligence, have discovered and produced at the trial.

In support of said motion for a new trial, the defendant hereby refers to and makes a part hereof

all of the records, evidence and proceedings in the above-entitled case, together with the affidavit of Theodore Kaphan filed herewith.

Wherefore, said defendant prays that said motion for a new trial be granted.

HARRY K. WOLFF,
H. M. OWENS,
Attorneys for Defeendant Theodore Kaphan.

Service admitted this —— day of January, 1919.

_____,
United States Attorney.

[Endorsed]: Filed Jan. 6, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [28]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND, and THEODORE KAPHAN,
Defendants.

Affidavit of Service on Motion for New Trial.

State of California,
City and County of San Francisco,—ss.

H. M. Owens, being duly sworn, says that, on the

6th day of January, 1919, he served upon Annette A. Adams, United States Attorney and attorney for the plaintiff in the above-entitled action, a notice, to wit, a motion for a new trial, a copy of which is hereunto annexed, by delivering such notice to and leaving it with her at her office in the United States Postoffice Building, Seventh and Mission Streets, in the city and county of San Francisco, State of California.

H. M. OWENS.

Subscribed and sworn to before me this 14th day of October, 1919.

[Seal] LESTER BALL,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 17, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [29]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

THE UNITED STATES OF AMERICA

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND, and THEODORE KAPHAN,

Defendants.

Affidavit of Theodore Kaphan on Motion for New Trial.

State of California,
City and County of San Francisco,—ss.

Theodore Kaphan, being duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that subsequent to the trial of defendant, to wit, on the 13th day of November, 1918, I have discovered evidence which will establish the fact that the witness Robert T. Ferguson, testified falsely in answer to questions propounded to him by counsel for this defendant as follows:

"Q. In consideration of your testifying in this case, have you been offered any reward or consideration in the matter of any punishment that might be meted out to you if you were to be found guilty in any of these other case?

"A. *None whatever.*

"Q. Was any suggestion made to you by the District Attorney or anyone from the District Attorney's office that a plea would be made for you for leniency in the event of your testifying in this case?

"*A. No.*

"Q. Your statement was made to the District Attorney freely and voluntarily?

"A. Yes, it is free and voluntary." [30]

That at the time when said questions were propounded and the answers thereto made by the said Robert T. Ferguson, one J. B. Densmore was present in the courtroom, sitting at the table with the United States District Attorney, advising with and assisting said United States District Attorney in the trial

of this defendant; that said Densmore testified in this case to the effect, that when he was investigating the cases at the Immigration Station, of which this case was one, that he was doing so as a representative of "The Department of Justice and the Department of Labor."

That at said time when the said Ferguson was testifying and when the said Densmore was present in court and heard the said Ferguson so testify aforesaid, the said Densmore well knew that he had on the 11th day of November, 1917, more than one year prior to said 13th day of November, 1918, promised said Ferguson complete immunity, in words and figures as follows, to wit:

"U. S. Department of Labor,
Immigration Service.

In answering refer to
No.

Office of the Commissioner,
Angel Island Station,
via Ferry Postoffice,
San Francisco, Cal.
Nov. 11, 1917.

My dear Mr. Fergusson,

I hope you will pardon me for not answering *you* letter of the third instant before this time, but the unusual press of official business has prevented me doing so.

I am very happy to confirm your belief that I will look out for the interest of your son Robert. I shall ask that he be given complete immunity as a govern-

ment witness. This means, of course, that he will not be required to suffer any punishment imposed by the Court. He has, however, been granted no immunity and must rely on my promise to obtain that clemency to which he will be entitled at the proper time. I want to assure you that I have the utmost confidence in him and I also agree with you that he is honest at heart. If and when this matter is over he will take hold of himself and put this mis-step behind him he will go ahead in a straightforward manner with no fear that he will ever again fall by the wayside.

Sincerely,
J. B. DENSMORE,
Natl. Director of Labor District, Washn., D. C."
Mr. M. J. Fergusson,
Los Angeles, Cal. [31]

That at the time the said Robert T. Ferguson so testified, he knew that the above and foregoing letter had been sent to his father by the said J. B. Densmore for his benefit and was familiar with the contents thereof.

That the said Densmore never at any time informed the Judge of this court or this affiant that he, the said Densmore, had promised the said Robert T. Ferguson, immunity but sat in this court and permitted this fraud to be practiced on this defendant and on the Court; that the U. S. District Attorney never at any time asked for a severance of the defendants and never at any time informed this defendant or this Court that immunity had been promised the defendant Robert T. Ferguson, but permitted the

said Robert T. Ferguson to testify as he did to the great injury to this defendant.

That this defendant did not know of the existence of said evidence at the time of the trial, and could not by the use of reasonable diligence have discovered and produced the same upon the former trial.

THEODORE KAPHAN.

Subscribed and sworn to before me this 4th day of January, 1919.

[Seal] R. M. BROWN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 6, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [32]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND, and THEODORE KAPHAN,

Defendants.

Affidavit of Service of Affidavit on Motion for New Trial.

State of California,
City and County of San Francisco,—ss.

H. M. Owens, being duly sworn, says that on the 6th day of January, 1919, he served upon Annette A. Adams, United States Attorney and attorney for the plaintiff in the above-entitled action, a notice, to wit, an affidavit on motion for a new trial, a copy of which is hereunto annexed, by delivering such notice to and leaving it with her at her office in the United States Postoffice Building, Seventh and Mission Streets, in the city and county of San Francisco, State of California.

H. M. OWENS.

Subscribed and sworn to before me this 14th day of October, 1919.

[Seal] LESTER BALL,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 17, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [33]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 6th day of January, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable M. T. DOOLING, Judge.

Nos. 6272–6273.

UNITED STATES OF AMERICA

vs.

THEODORE KAPHAN et al.

Minutes of Court—January 6, 1919—Order Submitting Motion for New Trial.

This case came on regularly this day for pronouncing of judgment upon defendant, Theodore Kaphan. Mrs. A. A. Adams, United States District Attorney, was present on behalf of the United States. Said defendant and his attorney, H. M. Owens, Esq., were present in court. Counsel for defendant made motion for new trial and after hearing the respective attorneys, the Court ordered said matter submitted.

This case also came on regularly this day for pronouncing of judgment on defendants, P. A. McFarland and R. W. Hendricks. On motion of Mrs. Adams, the Court ordered that said matter be continued to March 6, 1919. [34]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 16th day of January, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable M. T. DOOLING, Judge.

No. 6272.

UNITED STATES OF AMERICA

vs.

THEODORE KAPHAN et al.

Minutes of Court—January 16, 1919—Order Denying Motion for New Trial.

The Court ordered that the motion of defendant, Theodore Kaphan, for a new trial herein be and the same is hereby denied. After hearing Henry M. Owens, Esq., of counsel for said defendant, the Court further ordered that matter of judgment be continued to February 18, 1919. [35]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 16th day of January, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable M. T. DOOLING, Judge.

No. 6273.

UNITED STATES OF AMERICA

vs.

THEODORE KAPHAN et al.

Minutes of Court—January 16, 1919—Order Denying Motion for New Trial.

The Court ordered that the motion of defendant,

Theodore Kaphan, for a new trial herein be and the same is hereby denied. After hearing Henry M. Owens, Esq., of counsel for said defendant, the Court further ordered that this case be continued to February 18, 1919, for pronouncing of judgment upon said defendant, Theodore Kaphan. [36]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Indictments Numbers 6272, 6273.

THE UNITED STATES OF AMERICA

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND and THEODORE KAPHAN.

Defendants.

Motion in Arrest of Judgment.

Now comes Theodore Kaphan and hereby moves the above-entitled court for an order in arrest of judgment herein, upon the following grounds, to wit:

1. That said indictment does not set forth facts sufficient to constitute a public offense against the laws of the United States, or any public offense whatsoever.

2. That said indictment does not set forth facts sufficient to constitute a violation of section 37 of the Criminal Code of the United States or of any

other section of said Criminal Code or of any other law of the United States.

3. That said indictment does not set forth facts sufficient to constitute any conspiracy to wilfully, knowingly, unlawfully and feloniously bring into and cause to be brought into, and aid and abet the bringing into and landing in the United States by sea, or otherwise, or at all, through the port of San Francisco, in the Southern Division of the Northern District of California, or through any other port or place, from the Republic of China, or from any other place, certain, or any Chinese persons, who were not entitled to enter or remain in the United States.

4. That said indictment is uncertain in that it cannot be ascertained therefrom how or in what way any of said alleged overt acts committed by any of said defendants were in furtherance of any conspiracy or would effect and accomplish the object thereof. [37]

5. That said indictment is unintelligible for the same reasons urged in paragraph 4.

6. That said indictment is ambiguous for the same reasons urged in paragraph 4.

7. That said indictment is uncertain in that it cannot be ascertained therefrom how or in what manner the object of said alleged conspiracy was furthered or effected by the alleged fact that one of said defendants, to wit, Rolub W. Hendricks, did, during the month of October, 1916, or at any other time, in San Francisco, or elsewhere, deliver said or any records belonging to the Government of the

United States to the said defendant, Theodore Kaphan.

8. That said indictment is unintelligible for the same reasons urged in paragraph 7.

9. That said indictment is ambiguous for the same reasons urged in paragraph 7.

10. That the evidence presented in the case does not constitute any violation of section 37 of the Criminal Code of the United States as charged in the indictment.

11. That the evidence presented, even assuming it to be true, and all the prosecution claims for it, does not disclose any violation of section 37 of the Criminal Code of the United States, and that the facts presented in the case do not constitute any violation of section 37 of the Criminal Code of the United States within the time set forth in said indictment.

12. That said indictment in Number 6273 does not set forth facts sufficient to constitute any conspiracy to violate any of the provisions of section 128 of the Criminal Code of the United States or of any other section of said Criminal Code or of any other law of the United States.

13. That said indictment is uncertain in that it cannot be ascertained therefrom how or in what way any of said alleged overt acts committed by any of said defendants were in furtherance of any [38] conspiracy or would effect and accomplish the object thereof.

14. That said indictment is unintelligible for the same reasons urged in paragraph 13.

15. That said indictment is ambiguous for the same reasons urged in paragraph 13.

16. That indictment is uncertain in that it cannot be ascertained therefrom:

A. Whether said Immigration Office, at Angel Island, California, is a public office within the meaning of the law;

B. Whether said letters, official files, referred to in said indictment are public records within the meaning of the law;

C. Whether said letters and official files were ever filed or deposited in any public office;

D. What said official files consisted of;

E. Whether the act of abstracting from the files of the record-room of the Immigration Station at Angel Island, California, certain official files of the Government of the United States of certain Chinese persons referred to in said indictment constituted any violation of section 128 of the Criminal Code of the United States or of any other law of the United States.

17. That said indictment is unintelligible for the same reasons urged in paragraph 16.

18. That said indictment is ambiguous for the same reasons urged in paragraph 16.

19. That the evidence presented in the case does not constitute any violation of section 128 of the Criminal Code of the United States as charged in the indictment.

20. That the evidence presented, even assuming it to be true, and all the prosecution claims for it, does not disclose any violation of section 128 of the

Criminal Code of the United States within the time set forth in said indictment.

21. That the offenses alleged in both of said indictments were [39] distinct and separate from the offenses attempted to be proven at the trial herein; that this defendant has never had any opportunity to plead to any indictment charging him with said offenses attempted to be proven at the trial hereof.

22. That the defendants under indictment who testified against this defendant, were not competent witnesses to testify against this defendant on behalf of the United States in this, that none of said witnesses testified "at his own request," as provided in the Act of March 16, 1878, Chapter 37; 20 Statutes at Large, p. 30.

In support of said motion in arrest of judgment, the defendant hereby refers to and makes a part hereof all of the records, evidence and proceedings in the above-entitled case.

WHEREFORE said defendant, Theodore Kaphan, prays that said motion for an order in arrest of judgment be granted.

HARRY K. WOLFF,
H. M. OWENS,
Attorneys for Theodore Kaphan.

Service admitted this —— day of January, 1919.

_____,
United States Attorney.

[Endorsed]: Filed Feb. 18, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [40]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

UNITED STATES OF AMERICA
Plaintiff,

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND and THEODORE KAPHAN.
Defendants.

Affidavit of Service on Motion in Arrest of Judgment.

State of California,
City and County of San Francisco,—ss.

H. M. Owens, being duly sworn, says that, on the 18th day of February, 1919, he served upon Annette A. Adams, United States Attorney and attorney for the plaintiff in the above-entitled action, a notice, to wit, a motion in arrest of judgment, a copy of which is hereunto annexed, by delivering such notice to and leaving it with her at her office in the United States Postoffice Building, Seventh and Mission Streets, in the city and county of San Francisco, State of California.

H. M. OWENS.

Subscribed and sworn to before me this 14th day of October, 1919.

[Seal] LESTER BALL,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 17, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [41]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 18th day of February, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable M. T. DOOLING, Judge.

No. 6272.

UNITED STATES OF AMERICA

vs.

THEODORE KAPHAN.

Minutes of Court—February 18, 1919—Order Denying Motion in Arrest of Judgment.

In this case defendant, Theodore Kaphan, was present in court with attorney, Henry M. Owens, Esq. Mrs. A. A. Adams, United States District Attorney, was present on behalf of the United States. After hearing the respective attorneys, defendant, Theodore Kaphan, was called for judgment. Mr. Owens then made motion in arrest of judgment, and after hearing the respective attorneys, the Court ordered that said motion be and the same is hereby denied, to which order Mr. Owens entered an exception. No cause appearing why judgment should not be pronounced herein, the Court ordered that said

defendant, Theodore Kaphan, for the offense of which he stands convicted, be imprisoned for the period of Two (2) Years in the United States Penitentiary at McNeil Island, State of Washington, and that defendant stand committed to the custody of the United States Marshal for this District to execute said judgment, and that commitment issue accordingly. On motion of Mr. Owens, the Court further ordered that execution of said judgment be and the same is hereby stayed until March 3, 1919. [42]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 18th day of February, in the year of our Lord one thousand nine hundred and nineteen. Present: The Honorable M. T. DOOLING, Judge.

No. 6273.

UNITED STATES OF AMERICA

vs.

THEODORE KAPHAN.

Minutes of Court—February 18, 1919—Order Denying Motion in Arrest of Judgment.

In this case defendant, Theodore Kaphan, was present in court with attorney, Henry M. Owens, Esq. Mrs. A. A. Adams, United States District Attorney, was present on behalf of the United

States. After hearing the respective attorneys, defendant, Theodore Kaphan, was called for judgment. Mr. Owen then made motion in arrest of judgment, and after hearing the respective attorneys, the Court ordered that said motion be and the same is hereby denied, to which order Mr. Owens entered an exception. No cause appearing why judgment should not be pronounced herein, the Court ordered that said defendant, Theodore Kaphan, for the offense of which he stands convicted, be imprisoned for the period of Two (2) years in the United States Penitentiary at McNeil Island, State of Washington, and that defendant stand committed to the custody of the United States Marshal for this District to execute said judgment, and that commitment issue accordingly. On motion of Mr. Owens, the Court further ordered that execution of said judgment be and the same is hereby stayed until March 3, 1919. Further ordered that said judgment run concurrently with judgment this day entered in the case of the United States of America vs. Theodore Kaphan, No. 6272. [43]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 6272.

THE UNITED STATES OF AMERICA

vs.

THEODORE KAPHAN.

Judgment on Verdict of Guilty.

Convicted Viol. Sec. 37, Crim. Code.

Mrs. A. A. Adams, United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the indictment filed on the 19th day of October, 1917, charging him with the crime of Viol. Sec. 37 Crim. Code, U. S.; of his arraignment and plea of Not Guilty; of his trial and the verdict of the jury on the 13th day of November, 1918, to wit: "We, the Jury, find Theodore Kaphan, the defendant at the bar, Guilty as charged. George T. Kilham, Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion in arrest of judgment; thereupon the Court rendered its Judgment;

THAT WHEREAS, the said Theodore Kaphan having been duly convicted in this court of the crime of Viol. Sec. 37, Crim. Code, U. S.;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Theodore Kaphan be imprisoned for the term of two (2) years in the United States Penitentiary at McNeil Island, State of Washington.

Judgment entered this 18th day of February, A. D. 1919.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: Entered in Vol. 8, Judg. and Decrees, at page 426. [44]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 6273.

THE UNITED STATES OF AMERICA

vs.

THEODORE KAPHAN.

Judgment on Verdict of Guilty.

Convicted Viol. Sec. 37, Crim. Code.

Mrs. A. A. Adams, United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the indictment filed on the 19th day of October, 1917, charging him with the crime of Viol. Sec. 37, Crim. Code, U. S.; of his arraignment and

plea of Not Guilty; of his trial and the verdict of the jury on the 13th day of November, 1918, to wit: "We, the Jury, find Theodore Kaphan, the defendant at the bar, Guilty as charged. George T. Kilham, Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion in arrest of judgment; thereupon the Court rendered its judgment;

THAT WHEREAS, the said Theodore Kaphan having been duly convicted in this court of the crime of Viol. sec. 37, Crim. Code, U. S.;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Theodore Kaphan be imprisoned for the term of two (2) years in the United States Penitentiary at McNeil Island, State of Washington. Further ordered that said term of imprisonment run concurrently with that imposed on defendant in case No. 6272, United States vs. Theodore Kaphan.

Judgment entered this 18th day of February, A. D. 1919.

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: Entered in Vol. 8, Judg. and Decrees, at page 426. [45]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND and THEODORE KAPHAN.
Defendants.

Petition for Writ of Error.

Theodore Kaphan, one of the defendants in the above-entitled cause, feeling himself aggrieved by the judgment of the above-entitled court, entered upon the 18th day of February, 1919, whereby it was adjudged that the defendant Theodore Kaphan be confined in the Federal Penitentiary at McNeil's Island, State of Washington, for the term of two years, the sentence to run concurrently in the above-numbered causes; now comes through his attorneys and petitions said Court for an order allowing him, the said defendant, to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; and that all further proceedings in this Court be suspended, stayed and superseded until the determination of said writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit.

And your petitioner will ever pray, etc.

Dated: March 24, 1919.

H. M. OWENS,
HARRY K. WOLFF,

Service of within Petition for Writ of Error admitted this 24th day of March, 1919.

_____,
United States Attorney.

[Endorsed]: Filed Mar. 24, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [46]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND and THEODORE KAPHAN,
Defendants.

Affidavit of Service on Petition for Writ of Error.

State of California,
City and County of San Francisco,—ss.

H. M. Owens, being duly sworn, says that, on the 24th day of March, 1919, he served upon Annette A. Adams, United States Attorney and attorney for the plaintiff in the above-entitled action, a notice, to

wit, a petition for writ of error, a copy of which is hereunto annexed, by delivering such notice to and leaving it with her at her office in the United States Postoffice Building, Seventh and Mission Streets, in the city and county of San Francisco, State of California.

H. M. OWENS.

Subscribed and sworn to before me this 14th day of October, 1919.

[Seal] LESTER BALL,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 17, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [47]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND and THEODORE KAPHAN,
Defendants.

Assignment of Errors.

Now comes the defendant Theodore Kaphan, in the above-entitled cause, by Henry M. Owens, Esq.,

one of his attorneys, and specifies the following as the errors upon which he will rely and which he will urge upon his writ of error in the above-entitled cause, to wit:

1. The Court erred in overruling the demurrer interposed on behalf of said defendant, to which ruling said defendant then and there duly and regularly excepted.

2. The Court erred in denying the motion for a new trial, interposed on behalf of said defendant, to which ruling said defendant then and there duly and regularly excepted.

3. The Court erred in overruling the motion in arrest of judgment interposed on behalf of said defendant, to which ruling the defendant then and there duly and regularly excepted.

WHEREFORE, for the many manifest errors committed by said Court the defendant, Theodore Kaphan, through his attorneys prays that said sentence and judgment of conviction be reversed and for such other and further relief as the Court may think meet and proper.

Dated March 24, 1919.

H. M. OWENS,
HARRY K. WOLFF,
Attorneys for Said Defendant.

Service of within assignment of errors admitted this 24th day of March, 1919.

_____,
United States Attorney.

[Endorsed]: Filed Mar. 24, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [48]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND and THEODORE KAPHAN.
Defendants.

Affidavit of Service on Assignment of Errors.

State of California,
City and County of San Francisco,—ss.

H. M. Owens, being duly sworn, says that, on the 24th day of March, 1919, he served upon Annette A. Adams, United States Attorney and attorney for the plaintiff in the above-entitled action, a notice, to wit, an assignment of errors, a copy of which is hereunto annexed, by delivering such notice to and leaving it with her at her office in the United States Post-office Building, Seventh and Mission Streets, in the city and county of San Francisco, State of California.

H. M. OWENS.

Subscribed and sworn to before me this 14th day of October, 1919.

[Seal] LESTER BALL,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 17, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [49]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THEODORE KAPHAN, LEE YOW, ROLUB W. HENDRICKS, HARRY A. AKERS, PRESELEY A. McFARLAND.

Order Allowing Writ of Error.

Upon motion of Henry M. Owens, Esq., one of the attorneys for the defendant, Theodore Kaphan, in the above-entitled cause, and upon filing the petition for a writ of error and assignment of errors herein;

IT IS HEREBY ORDERED that a writ of error be, and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore rendered herein, and other matters and things in said petition and assignment of error set forth; the defendant Theodore Kaphan is permitted to bail in the sum of $3,000.00. The bonds for costs upon the writ of error is hereby fixed at $300.00, and in the meanwhile it is ordered that all further proceedings in this court be suspended, stayed and superseded until the determination of said writ of error by the United

States Circuit Court of Appeals for the Ninth Circuit.

Dated: March 24, 1919.

M. T. DOOLING,
United States District Judge.

Service of within order allowing writ of error admitted this 24th day of March, 1919.

_____,
United States Attorney.

[Endorsed]: Filed Mar. 24, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [50]

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND and THEODORE KAPHAN,
Defendants.

Affidavit of Service of Order Allowing Writ of Error.

State of California,
City and County of San Francisco,—ss.

H. M. Owens, being duly sworn, says that, on the 24th day of March, 1919, he served upon Annette A. Adams, United States Attorney and attorney for the

plaintiff in the above-entitled action, a notice, to wit, order allowing writ of error, a copy of which is hereunto annexed, by delivering such notice to and leaving it with her at her office in the United States Postoffice Building, Seventh and Mission Streets, in the city and county of San Francisco, State of California.

H. M. OWENS.

Subscribed and sworn to before me this 14th day of October, 1919.

[Seal] LESTER BALL,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 17, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [51]

In the District Court of the United States of America, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

UNITED STATES OF AMERICA

vs.

THEODORE KAPHAN.

Now comes the defendant Theodore Kaphan, and by leave of Court first had and obtained files and presents for settlement this his Bill of Exceptions as allowed by the Court.

Bill of Exceptions.

BE IT REMEMBERED, that heretofore, the Grand Jury of the United States, in and for the

Southern Division of the Northern District of California, did file and turn in, to and before the above-entitled court its indictment above numbered, against the defendants Harry Akers, Lee Yow, Rolub W. Hendricks, Pressley A. McFarland and Theodore Kaphan, and thereafter the said defendants appeared in court, and upon being called to plead to said indictments, each filed a demurrer to said indictments, as shown by the records herein, and the said demurrers being overruled by the Court, the said defendants pleaded not guilty, as shown by the record herein, and the cause being at issue, the same came on for trial on the 12th day of November, 1918, before the Hon. M. T. Dooling, District Judge; that at the calling of the cause, the defendants Harry A. Akers, Rolub W. Hendricks and Pressley A. McFarland withdrew their plea of not guilty in open court and pleaded guilty to the said indictments; that immediately thereafter a jury was duly impaneled to try the defendant, Theodore Kaphan, the United States being represented by Annette A. Adams, United States Attorney, and the defendant, Theodore Kaphan, being represented by Harry K. Wolff, Esq., and Henry M. Owens, Esq., [52] the following proceedings were had:

The two indictments, numbered 6272 and 6273, were consolidated and agreed by the defendant's attorneys and the United States Attorney that the evidence should be applied to both and be tried together and that the evidence shall be considered in both cases.

Tuesday, November 12, 1918.

Counsel appearing:

For the Government: Mrs. ANNETTE A. ADAMS.

For the Defendant: HARRY K. WOLFF, Esq., and HENRY M. OWENS, Esq.,

(The above-entitled cause came regularly on for trial this 12th day of November, 1918, and after a jury had been duly impaneled to try the cause a recess was taken until 2 P. M.)

(The following witnesses were called in behalf of the United States, duly sworn, and testified: Robert T. Ferguson, William J. Armstrong, Pressley A. McFarland, Harry A. Akers, Rolub W. Hendricks, Edward M. White, and J. B. Densmore.

The following witnesses were called in behalf of the defendant, duly sworn, and testified: Theodore Kaphan and Mary E. Kaphan.)

And after the arguments of counsel, and the giving of instructions by the Court, the cause was submitted to the jury.

Thereupon at —— P. M., November 13th, 1918, the jury retired to deliberate upon their verdict; and at —— P. M. returned into court, and finding the defendant Theodore Kaphan guilty as charged on both of the indictments.

After the jury had returned a verdict, the Court set the 30th day of November, 1918, as the day of sentence, which time for sentence was regularly continued to the 6th day of January, 1919, [53] at which time the defendant interposed a motion for a new trial, and on the 16th day of January, 1919,

said motion for a new trial was denied, to which the defendant excepted, and the Court set the 18th day of February, 1919, as the day of sentence, at which time the defendant interposed a motion in arrest of judgment, the Court overruled said motion and thereupon on the 18th day of February, 1919, the Court rendered judgment sentencing said Theodore Kaphan to serve two years in the Federal Penitentiary at McNeil's Island, State of Washington, on both of said indictments, the sentence to run concurrently, to which order of overruling of the motion in arrest of judgment and sentencing the said defendant to two years at the said Federal Penitentiary, the defendant duly and regularly excepted.

Said defendant, Theodore Kaphan, hereby presents the foregoing as his bill of exceptions herein, and respectfully asks that the same be allowed, signed, sealed, and made a part of the record in this cause.

Dated this 13th day of March, 1919.

HENRY M. OWENS,
HARRY K. WOLFF,
Attorneys for Defendant, Theodore Kaphan. [54]

In the District Court of the United States of America, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

UNITED STATES OF AMERICA

vs.

THEODORE KAPHAN.

Notice of Presentation of Bill of Exceptions.

To Mrs. ANNETTE A. ADAMS, United States District Attorney, Northern District of California:

YOUR WILL PLEASE TAKE NOTICE that the foregoing constitutes and is the bill of exceptions as allowed by the Court, in the above-entitled cause, and the defendant, Theodore Kaphan, will apply to the said Court to allow said bill of exceptions, and to sign and seal the same as the bill of exceptions herein.

H. M. OWENS and
HARRY K. WOLFF,
Attorneys for Defendant Theodore Kaphan.

Receipt of a copy of the foregoing notice of presentation of bill of exceptions is hereby admitted this 29 day of Sept., 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney. [55]

In the District Court of the United States of America, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

UNITED STATES OF AMERICA

vs.

THEODORE KAPHAN.

Stipulation Re Bill of Exceptions.

IT IS HEREBY STIPULATED AND AGREED that the foregoing bill of exceptions is correct and that the same may be signed, settled, allowed and sealed by the Court.

HENRY M. OWENS and
HARRY K. WOLFF,
Attorneys for Defendant Theodore Kaphan. [56]

In the District Court of the United States of America, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

UNITED STATES OF AMERICA

vs.

THEODORE KAPHAN.

Order Settling etc. Bill of Exceptions.

This bill of exceptions is now signed, sealed and made a part of the records in this case, and is allowed as correct.

Dated at San Francisco, California, this 1st day of October, 1919.

M. T. DOOLING,
Judge of the United States District Court, Northern District of California.

Receipt of a copy of the within order of Judge settling bill of exceptions is hereby admitted this 1st day of October, 1919.

ANNETTE ABBOTT ADAMS,
United States Attorney.

[Endorsed]: Filed Oct. 2, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [57]

Certificate of Clerk U. S. District Court to Transcript on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 57 pages, numbered from 1 to 57, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the cases of the United States of America vs. Theodore Kaphan, et al., Nos. 6272 and 6273, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with praecipe for transcript of record (copy of which is embodied in this transcript), and the instructions of the attorneys for the plaintiff in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error

is the sum of Nineteen Dollars and Thirty Cents ($19.30), and that the same has been paid to me by the attorneys for the plaintiff in error herein.

Annexed hereto is the original writ of error (page 59) with the return of said District Court to said writ of error attached thereto (page 60), and the original citation on writ of error (page 61).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 19th day of November, 1919.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [58]

(Writ of Error.)

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, To the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Theodore Kaphan, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Theodore Kaphan, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice

done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, the 24th day of March, in the year of our Lord one thousand nine hundred and nineteen.

W. B. MALING,

Clerk of the United States District Court, Northern District of California.

By T. L. Baldwin,
Deputy Clerk.

Allowed by:

M. T. DOOLING,
United States District Judge. [59]

[Endorsed]: Nos. 6272–6273. United States District Court for the Northern District of California. Theodore Kaphan, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Mar. 24, 1919. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk.

Return to Writ of Error.

The answer of the Judges of the District Court of the United States, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 24th day of March, 1919, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,

Clerk, U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [60]

(Citation on Writ of Error.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San

Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California wherein Theodore Kaphan is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 24th day of March, A. D. 1919.

M. T. DOOLING,
United States District Judge. [61]

United States of America,—ss.

On this 24th day of March, in the year of our Lord one thousand nine hundred and nineteen, personally appeared before me, a Deputy Clerk U. S. District Court, Northern District of California, the subscriber, H. M. Owens and makes oath that he delivered a true copy of the within citation to Mrs. Annette A. Adams, United States District Attorney.

H. M. OWENS.

Subscribed and sworn to before me at San Francisco, his 24th day of March, A. D. 1919.

[Seal] T. L. BALDWIN,
Deputy Clerk U. S. District Court, Northern District of California.

Return to Writ of Error.

The answer of the Judges of the District Court of the United States, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 24th day of March, 1919, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,

Clerk, U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [60]

(Citation on Writ of Error.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San

Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California wherein Theodore Kaphan is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 24th day of March, A. D. 1919.

M. T. DOOLING,
United States District Judge. [61]

United States of America,—ss.

On this 24th day of March, in the year of our Lord one thousand nine hundred and nineteen, personally appeared before me, a Deputy Clerk U. S. District Court, Northern District of California, the subscriber, H. M. Owens and makes oath that he delivered a true copy of the within citation to Mrs. Annette A. Adams, United States District Attorney.

H. M. OWENS.

Subscribed and sworn to before me at San Francisco, his 24th day of March, A. D. 1919.

[Seal] T. L. BALDWIN,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Nos. 6272–6273. United States District Court for the Northern District of California. Theodore Kaphan, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Mar. 24, 1919. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk

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[Endorsed]: No. 3418. United States Circuit Court of Appeals for the Ninth Circuit. Theodore Kaphan, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed November 19, 1919.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division.

Nos. 6272–6273.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

HARRY A. AKERS, LEE YOW, ROLUB W. HENDRICKS, PRESELEY A. McFARLAND, and THEODORE KAPHAN.
Defendants.

Order Extending Time for Clerk to Complete and Transmit Transcript.

Good cause appearing therefor, it is hereby ordered that the return day to the writ of error and citation on the writ of error may be and the same is hereby extended thirty (30) days from October 22, 1919, in order to permit the Clerk of the above-entitled court to complete and transmit the transcript to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: October 22d, 1919.

WM. W. MORROW,
Judge United States Circuit Court of Appeals, Ninth Judicial Circuit.

[Endorsed]: Nos. 6272–6273. In the District Court of the United States, in and for the Southern Division of the Northern District of California, First Division. The United States of America, Plaintiff, vs. Harry A. Akers, Lee Yow, Rolub W. Hendricks,

Preseley A. McFarland, and Theodore Kaphan, Defendants. Order Extending Time for Clerk to Complete and Transmit Transcript. Filed Oct. 22, 1919. F. D. Monckton, Clerk.

No. 3418. United States Circuit Court of Appeals for the Ninth Circuit. Refiled Nov. 19, 1919. F. D. Monckton, Clerk.

No. 3418

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THEODORE KAPHAN,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

HENRY M. OWENS,
Attorney for Plaintiff in Error.

PERNAU-WALSH PRINTING CO.

No. 3418

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THEODORE KAPHAN,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Statement of Case.

On the 19th day of October, 1917, indictments numbers 6272-6273 were found by the grand jury for the Southern Division of the Northern District of California, convened at the City and County of San Francisco, against Harry A. Akers, Lee Yow, Rolub W. Hendricks, Presceley A. McFarland and Theodore Kaphan (see Trans. pages 2 to 10 inclusive).

The defendants Theodore Kaphan demurred to said indictments (Trans. pages 11 to 16 inclusive), and his said demurrers having been overruled, entered a plea of not guilty (Trans. pages 17 to 19).

The causes came on for trial on the 12th day of November, 1918, all of said defendants were present in Court, except the defendant Lee Yow, a motion was made for severance of trial on behalf of Lee Yow, and the Court granted said motion.

The jury panel being present in the court room, the defendant Harry A. Akers was arraigned and pleaded "Guilty" to indictments Nos. 6272-6273. On motion of Mrs. Adams, the United States District Attorney, the Court granted said defendants Rolub W. Hendricks and Preseley A. McFarland leave to withdraw pleas of "Not guilty" heretofore entered herein and accordingly each of said defendants, Rolub W. Hendricks and Preseley A. McFarland, withdrew said pleas, and plead "Guilty" to said indictments and this case was continued to November 18, 1918, for pronouncing of judgment upon said defendants Harry A. Akers, Rolub W. Hendricks, and Preseley A. McFarland.

CONSOLIDATION OF ACTIONS.

The Court after hearing the respective attorneys, ordered that the trial of defendant Theodore Kaphan herein be and the same is hereby consolidated with the case of the United States of America vs. Harry A. Akers et al., No. 6273, and the Court ordered that the trial of the defendant, Theodore Kaphan proceed and that the jury box be filled from the regular panel of trial jurors of this Court.

Thereupon twelve persons having been accepted as jurors to try said defendant were accordingly sworn.

Mrs. Adams made statement to the Court and jury as to the nature of the case and called Robert T. Ferguson, William J. Armstrong and Preseley A. McFarland each of whom was duly sworn and examined on behalf of the United States (Trans. page 23). Whereupon the trial of the cause was continued to November 13, 1918, when the defendants Harry A. Akers and Rolub W. Hendricks were each duly sworn and examined on behalf of the United States, the consolidated cases were argued and submitted and the jury returned a verdict of guilty (Trans. pages 25-26).

Thereafter on the 6th day of January, 1919, said defendant interposed a motion for a new trial (Trans. pages 27-28-29-30). That accompanying said motion for a new trial was the affidavit of the defendant Theodore Kaphan (Trans. pages 30-31-32-33-34), and said motion for new trial was on the 16th day of January, 1919, denied, and the Court ordered that the matter of judgment be continued to February 18, 1919 (Trans. pages 37-38), and on the 18th day of February, 1919, said defendant Theodore Kaphan interposed a motion in arrest of judgment (Trans. pages 38-39-40-41-42), which said motion was denied (Trans. pages 44-45-46). Thereafter on said 18th day of February, 1919, judgment was rendered, sentencing the said defendant to imprisonment for the term of two years in the United

States Penitentiary at McNeil Island, State of Washington, said term of imprisonment to run concurrently with that imposed on defendant in case No. 6272 (Trans. pages 47-48-49). Thereafter on the 24th day of March, 1919, a writ of error was sued out to review the judgment and proceedings of the trial Court (Trans. pages 50-51) and on said 24th day of March, 1919, said defendant duly served and filed his assignment of errors (Trans. pages 52-53-54); that on said 24th day of March, 1919, said Court made an order allowing writ of error (Trans. pages 55-56). That thereafter on the 13th day of March, 1919, the defendant presented to the Court his bill of exceptions, which was allowed and settled on the 1st day of October, 1919 (Trans. pages 57-58-59-60-61-62-63).

II.

Specifications of the Errors Relied Upon.

A. The action of the Court in overruling the demurrers (Trans. pages 11 to 16, inclusive) of defendant to the indictments is assigned as error (Trans. page 53).

B. The action of the Court in denying the motion for a new trial interposed by defendant is assigned as error (Trans. page 53).

C. The action of the Court in denying defendant's motion in arrest of judgment is assigned as error (Trans. page 53).

III.

Argument.

1. The action of the Court in overruling the demurrers to both indictments as specified in paragraph (a) of subdivision 2 of this brief constitutes reversible error.

Indictment 6272 shows that Lee Yow delivered to Harry A. Akers certain letters; that Akers delivered said letters to Hendricks, and Hendricks delivered said letters to certain Chinese applicants. Lee Yow paid Akers $45.00 and Akers paid Hendricks $20.00.

McFarland abstracted from the files of the Record Room certain official files and delivered said files to Hendricks and Hendricks delivered said records to Kaphan, but there is no allegation what Kaphan did with said records which would unlawfully and feloniously bring into and cause to be brought into and landing in the United States by sea or otherwise through any port certain Chinese persons, not entitled to enter or remain in the United States. The demurrer for these reasons should have been sustained.

Indictment No. 6273 shows that Lee Yow delivered to Akers certain letters addressed to Chinese applicants containing questions and answers to be used as a means to gain admission to the United States; that Akers delivered said letters to Hendricks; that Hendricks delivered said letters to

certain Chinese applicants; that Lee Yow paid Akers $45.00 and Akers paid Hendricks $20.00.

McFarland abstracted certain files from the Record Room of certain Chinese, delivered these files to Hendricks and Hendricks delivered said files to Kaphan.

It does not appear therefrom what Kaphan did with the said files, nor does it appear that the Chinese named in the records were or were not entitled to enter the United States, nor does it appear therefrom how or in what manner the alleged conspiracy was to be carried out or whether any Chinese persons were ever landed unlawfully at any port of the United States. The demurrer to No. 6273 for these reasons should have been sustained.

The rule is fundamental that the indictment must so allege as to charge a crime within the plain, ordinary meaning, letter and spirit of the statute. In 22 Cyc. 335, the ruling law is stated as follows:

> "c. Sufficiency of Statement—(1) Necessity of Stating Essentials. An indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself; and in order that it shall so appear, the pleader must either charge the offense in the language of the act, or specifically set forth the facts constituting the same. The general rule is that the charge must be so laid in the indictment as to bring the case precisely within the description of the offense as given in the statute, alleging distinctly all the essential requisites that con-

stitute it. Such facts must be alleged that, if proven, defendant cannot be innocent. Either the letter or the substance of the statute must be followed, and nothing is to be left to implication or intendment or to conclusion. The want of direct averments of material facts cannot be supplied by argument or inference, nor by the conclusion 'contrary to the form of the statute.'"

We also find in 22 Cyc. 295 the law stated that with reference to:

"2. Certainty and Particularity. The indictment should contain such a specification of acts and descriptive circumstances as will on its face fix and determine the identity of the offense with such particularity as to enable the accused to know exactly what he has to meet, and avail himself of a conviction or acquittal as a bar to a further prosecution arising out of the same facts. Such certainty is also required that the court, on an inspection of the indictment, may determine that an offense has been committed, and may confine the evidence on the trial to the issues presented, and in case of conviction may determine what punishment should be imposed, and that a reviewing court may determine from the record whether or not error has been committed. The omission of a material averment in an indictment cannot be supplied by an instruction, or by the proof, or by the finding of the jury of a fact not alleged. Whatever is indispensably necessary to be proved to warrant a conviction must as a general rule be alleged."

It was held in Evans v. United States, 153 U. S. 587, that:

"The crime must be charged with precision and certainty, and every ingredient of which it

is composed must be accurately and clearly alleged. (citing) United States v. Cook, 17 Wall. 168, 174; United States v. Cruikshank, 92 U. S. 542, 558.

The fact that the statute in question, read in the light of the common law, and of other statutes on like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." (citing) United States v. Carll, 105 U. S. 611.

'Even in cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates.' (citing) United States v. Simmons, 96 U. S. 360; United States v. Hess, 124 U. S. 483; Pettibone v. United States, 148 U. S. 197."

2. The action of the Court in denying the motion for a new trial interposed by defendant as specified in paragraph (B) of subdivision 2 of this brief constitutes reversible error, and in this behalf we respectfully call to the Court's attention the affidavit of the defendant which is in words and figures as follows, to wit:

"AFFIDAVIT OF THEODORE KAPHAN OF MOTION FOR NEW TRIAL.

State of California,
City and County of San Francisco.—ss.

Theodore Kaphan, being duly sworn deposes and says: That he is one of the defendants in

the above-entitled action; that subsequent to the trial of defendant, to wit, on the 13th day of November, 1918, I have discovered evidence which will establish the fact that the witness Robert T. Ferguson, testified falsely in answer to questions propounded to him by counsel for this defendant as follows:

'Q. In consideration of your testifying in this case, have you been offered any reward or consideration in the matter of any punishment that might be meted out to you if you were to be found guilty in any of these other cases?

'A. *None whatever.*

'Q. Was any suggestion made to you by the District Attorney or anyone from the District Attorney's office that a plea would be made for you for leniency in the event of your testifying in this case?

'A. *No.*

'Q. Your statement was made to the District Attorney freely and voluntarily?

'A. Yes, it is free and voluntary.'

That at the time when said questions were propounded and the answers thereto made by the said Robert T. Ferguson, one J. B. Densmore was present in the courtroom, sitting at the table with the United States District Attorney, advising with and assisting said United States District Attorney in the trial of this defendant; that said Densmore testified in this case to the effect, that when he was investigating the cases at the Immigration Station, of which this case was one, that he was doing so as a representative of 'The Department of Justice and the Department of Labor.'

That at said time when the said Ferguson was testifying and when the said Densmore was present in court and heard the said Ferguson so testify aforesaid, the said Densmore well knew that he had on the 11th day of November, 1917, more than one year prior to said 13th day of

November, 1918, promised said Ferguson complete immunity, in words and figures as follows, to wit:

'U. S. Department of Labor,
Immigration Service.

In answering refer to
No.

Office of the Commissioner,
Angel Island Station,
via Ferry Postoffice,
San Francisco, Cal.
Nov. 11, 1917.

My dear Mr. Fergusson,

I hope you will pardon me for not answering *you* letter of the third instant before this time, but the unusual press of official business has prevented me doing so.

I am very happy to confirm your belief that I will look out for the interest of your son Robert. I shall ask that he be given complete immunity as a government witness. This means, of course, that he will not be required to suffer any punishment imposed by the Court. He has, however, been granted no immunity and must rely on my promise to obtain that clemency to which he will be entitled at the proper time. I want to assure you that I have the utmost confidence in him and I also agree with you that he is honest at heart. If and when this matter is over he will take hold of himself and put this mis-step behind him he will go ahead in a straightforward manner with no fear that he will ever again fall by the wayside.

Sincerely,
J. B. Densmore.

Natl. Director of Labor District, Washn., D. C.'

Mr. M. J. Fergusson,
Los Angeles, Cal.

That at the time the said Robert T. Ferguson so testified, he knew that the above and fore-

going letter had been sent to his father by the said J. B. Densmore for his benefit and was familiar with the contents thereof.

That the said Densmore never at any time informed the Judge of this Court or this affiant that he, the said Densmore, had promised the said Robert T. Ferguson, immunity but sat in this Court and permitted this fraud to be practiced on this defendant and on the Court; that the U. S. District Attorney never at any time asked for a severance of the defendants and never at any time informed this defendant or this Court that immunity had been promised the defendant Robert T. Ferguson, but permitted the said Robert T. Ferguson to testify as he did to the great injury to this defendant.

That this defendant did not know of the existence of said evidence at the time of the trial, and could not by the use of reasonable diligence have discovered and produced the same upon the former trial.

THEODORE KAPHAN.

Subscribed and sworn to before me this 4th day of January, 1919.

(Seal) R. M. Brown,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed): Filed Jan. 6, 1919. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk."

We respectfully submit that the trial Court abused its discretion in denying said motion to the great detriment of defendant, and that the said motion for a new trial should have been granted.

It was held in

Heitler v. U. S., 244 Fed. Rep. 142:

"From the record it is clear that the government must have intended from the first to use

these defendants as witnesses, since without them no possible case of conspiracy was undertaken to be made out. It is likewise clear that immunity for testifying was, before the trial, promised Rosensweig. Although he denied it, his attorney Hulbert, called as a witness for the defense, testified that he made such an arrangement for Rosensweig with the government, and had told Rosensweig if he testified that would be all there would be to it. There is of course no necessary impropriety in making such an arrangement, nor in offering immunity in proper cases. These are matters which usually on behalf of the government rest primarily in the sound discretion and good judgment of its prosecuting officers, acting in good faith for the public interest. But such agreements must not be employed for the purpose, or with the probable effect, of embarrassing other defendants in the conduct of their defense, through leading them to believe that their codefendants are in good faith defending against the same charge, when in truth and to the knowledge of the prosecutor they are not. Under the facts indicated, and particularly with the attention of the prosecutor challenged thereto, the prosecutor should frankly have stated in the beginning that the government expected to call these defendants as witnesses, and that Rosensweig had been promised immunity for his testimony. He might further, with entire propriety, before the trial began, have asked severance (which under the circumstances would undoubtedly have been granted) as to the defendants who were to testify, and thus have avoided the possible unfairness to the other defendants in leaving the court without discretion to separate witnesses who remain only in name as defendants on trial. If from the situation disclosed, the record did not leave it clear that no harm came to plaintiff in error through the prosecutor's failure

to so disclose and to ask severance, it would be the duty of this court to set aside the judgment."

3. The action of the Court in denying defendant's motion in arrest of judgment as specified in paragraph (C) of subdivision 2 of this brief constitutes reversible error.

The same argument given under paragraph 1 of subdivision 3 applies to paragraph 3 hereof.

We respectfully submit that the trial Court erred as above specified in subdivision 2 of this brief and that the judgment rendered in the above and foregoing causes should be reversed and set aside for the reasons hereinabove set forth.

Dated, San Francisco,
February 12, 1920.

HENRY M. OWENS,
Attorney for Plaintiff in Error.

No. 3418

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE KAPHAN,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error

BRIEF OF DEFENDANT IN ERROR.

ANNETTE ABBOTT ADAMS,
United States Attorney.

No. 3418

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE KAPHAN,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

An indictment, No. 6772 (Tr. pp. 2-6), was filed in the United States District Court in and for the Northern District of California on the 19th day of October, 1917, charging Theodore Kaphan, Harry A. Akers, Lee Yow, Rulub W. Hendricks and Presley A. McFarland with conspiring to bring into the United States and to cause to be brought into, and to aid and abet the bringing into and landing in the United States, by sea, or otherwise, through the port of San Francisco, persons not entitled to enter or remain in the United States. On the same date a second indictment, No. 6273 (Tr. pp. 7-10), was filed charging the same parties with conspiring to conceal, remove, mutilate and destroy, records,

papers and other documents filed in the United States Immigration Office at Angel Island, California. Demurrers to the said indictments having been overruled by the Court, the defendants entered pleas of "not guilty," and thereafter, to-wit, on the 12th day of November, 1918, the said indictments came on for trial, the Court having ordered them consolidated for the purposes of trial.

Before a jury was drawn, the defendants Hendricks, McFarland and Akers, by leave of Court, withdrew their pleas of "not guilty" and entered pleas of "guilty"; on motion of counsel for defendant Lee Yow a severance was granted as to the said Lee Yow, and the trial proceeded as to defendant Kaphan alone. At the conclusion of the case on November 13th, the Jury found the said defendant Kaphan guilty as charged on both indictments. Thereafter counsel for said defendant filed a motion for a new trial (Tr. p. 27) and a motion in arrest of judgment (Tr. p. 38), both of which were overruled by the Court on the 18th day of November, whereupon the Court sentenced the defendant Theodore Kaphan to imprisonment for a period of two years in the United States Penitentiary at McNeil Island on each indictment, sentences

to run concurrently. Thereafter counsel for Kaphan sued out a writ of error, the assignments of error being as follows:

> 1. The Court erred in overruling the demurrer interposed on behalf of said defendant, to which ruling said defendant then and there duly and regularly excepted.
> 2. The Court erred in denying the motion for a new trial, interposed on behalf of said defendant, to which ruling said defendant then and there duly and regularly excepted.
> 3. The Court erred in overruling the motion in arrest of judgment interposed on behalf of said defendant, to which ruling the defendant then and there duly and regularly excepted.

ARGUMENT.

The assignments of error are too general and indefinite. It is a well established rule, and the rule of this Court, that assignments of error must point out definitely and specifically the errors upon which an appellant relies.

> *Scholey* v. *Rew,* 23 Wall. 331, 23 L. Ed. 99;
> *Lucas* v. *Brooks,* 18 Wall, 436, 21 L. Ed. 637;
> *Bogt* v. *Gassert,* 149 U. S. 17, 37 L. Ed. 637;
> *Hansen* v. *Boyd,* 161 U. S. 397, 40 L. Ed. 746;
> *Matheson* v. *United States,* 227 U. S. 540, 57 L. Ed. 631;
> *Betts* v. *United States,* 132 Fed. 228;
> *McClendon* v. *United States,* 229 Fed. 5230;
> *Collins* v. *United States,* 219 Fed. 670;
> *Rule 11, Rules of the United States Circuit Court of Appeals for the Ninth Circuit.*

An assignment that the Court erred in overruling a demurrer or motion for a new trial or in arrest of judgment is too general.

Van Stone v. *Stillwell, etc., Mnfg. Co,* 142 U. S. 128, 35 L. Ed. 961.

II.

The demurrers to the indictment were properly overruled. It is to be noted that each of the indictments charges a conspiracy to commit an offense against the United States, the first a conspiracy to violate the Immigration Act and the second to violate Section 128 of the United States Penal Code. Both indictments set forth the offenses in the language of the statutes and contain numerous overt acts committed by the defendants, Lew Yow, Akers, McFarland and Hendricks.

Counsel for appellant presents in his brief but one reason why the demurrer to indictment No. 6272 should have been sustained. He states (Brief p. 5) that while there is an allegation therein that McFarland abstracted official files from the Record Room at Angel Island, and gave them to Hendricks who gave them to Kaphan, that there is nothing alleged as to how Kaphan's use of same would bring or cause to be brought into the United States, Chinese persons not entitled to enter or remain in the United States.

We answer that such matter is purely evidentiary and not necessary to be pleaded in an indictment for conspiracy. It is elementary that it is not necessary that an indictment show on its face that an overt act would effect the object of the conspiracy if it is alleged that the overt act was done in pursuance of the conspiracy and to effect and accomplish the object thereof (*Houston* v. *U. S.,* 217 Fed. 852), and it is not necessary to either allege or prove an overt act against each member of the conspiracy; the conspiracy is the gist of the offense. (*Bannon* v. *U. S.,* 156 U. S. 464, 39 L. Ed. 494.)

Similar objections are urged by counsel for plaintiff in error regarding indictment No. 6273, and to such objections the same principles apply.

For the convenience of the Court, Sections 37 and 128 of the Penal Code and Section 11 of the Chinese Immigration Act follow:

Section 11, Act of May 6, 1882, as amended and added to by Act of July 5, 1884:

> "That any person who shall knowingly bring into or cause to be brought into the United States by land, or who shall aid or abet the same, or aid or abet the landing in the United States from any vessel, of any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall on conviction thereof, be fined in a sum not exceeding one thousand dollars, and imprisoned for a term not exceeding one year."

Section 37 of the United States Penal Code:

> "If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

Section 128 of the United States Penal Code:

> "Whoever shall wilfully and unlawfully conceal, remove, mutilate, obliterate, or destroy, or attempt to conceal, remove, mutilate, obliterate, or destroy, or, with intent to conceal, remove, mutilate, obliterate, destroy, or steal, shall take away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than two thousand dollars, or imprisoned not more than three years, or both."

III.

The motion for a new trial was properly denied.

In the first place, a motion for a new trial is addressed to the discretion of the Court and an order denying same is not reviewable by an appellate court.

Blitz v. *U. S.*, 153 U. S. 308, 38 L. Ed. 725;
Mattox v. *U. S.*, 146 U. S. 140, 36 L. Ed. 917;
N. Y. Central, etc., Ry. Co. v. *Fraloff*, 100 U. S. 24, 25 L. Ed. 531;
Collins v. *U. S.*, 219 Fed. 670;
Higgins v. *U. S.*, 185 Fed. 710.

But should this Honorable Court consider the matter it is obvious that the grounds of the motion did not justify the granting of a new trial to defendant. Counsel for plaintiff in error in his brief urges but one of the grounds set forth in his original motion, to-wit, that new evidence had been discovered material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial. This alleged newly discovered evidence purports to be set forth in an affidavit of defendant Kaphan (Tr. p. 31), in which he alleges that the witness Robert F. Fergusson testified falsely in answer to questions propounded to him by counsel for defendant in that he stated that he had been offered no reward or consideration in the matter of punishment if he were "found guilty in any of these other cases"; and also in that he stated that neither the District Attorney nor anyone from the District Attorney's office had made a suggestion that a plea for leniency would be made for him in the event of his testifying in the case.

It does not appear in the affidavit of Kaphan or anywhere else in the record that Fergusson was a defendant or that any charges whatsoever were pending against him at the time that he testified; on the other hand, it appears affirmatively that he was not indicted with the defendants Kaphan, Akers, McFarland, Yee Yow and Hendricks. It does not appear from the facts that are set up in the affidavit that Fergusson had been promised immunity in consideration of his testifying in the said case, or that the letter of J. B. Densmore set forth in said affidavit (Tr. p. 32) had any reference to or bearing whatsoever upon the cases on trial; furthermore the letter itself plainly shows that the writer thereof, J. B. Densmore, was not acting for or representing the United States Attorney at the time said letter was written, and it nowhere appears that the United States Attorney even knew of the existence of the said letter. It nowhere appears how the so-called newly discovered evidence had it been known to defendant at the time of his trial would or could have affected the result of his trial; he does not even claim in his motion or in his affidavit in support thereof that it would have done so.

Fergusson was but one of several witnesses who testified for the Government, and the materiality

of his testimony is not anywhere shown in the record—for all that appears he might have been called merely to identify a record.

The case of *Heitler* v. *United States,* 244 Fed. 142, cited by counsel for plaintiff in error, bears no analogy to the present case. In that case it appears that the District Attorney did not at the beginning of the trial, indicate that two of the defendants would be used as witnesses, and did not ask severance as to them, but proceeded to trial as if said defendants were on trial with the defendant Heitler; in the present case no such situation was presented. The minutes of the Court for November 12, 1918, the day upon which the trial began, show (Tr. p. 19) that before the Jury was drawn Akers, Hendricks and McFarland pleaded "guilty" to the charges against them, that a severance was granted as to Lee Yow, and that the trial proceeded as to Kaphan alone. Neither defendant nor his counsel at any time could have believed that the co-defendants who were called as witnesses for the prosecution were, as was the case in *United States* v. *Heitler,* defending against the same charge. And it is further to be noted that even in the Heitler case, the appellate court, though expressing disapproval of the course pursued by the prosecution,

held such conduct constituted harmless error, since it did not appear that any harm to the defendant on trial resulted therefrom.

IV.

The action of the Court in denying defendant's motion in arrest of judgment was not error. Counsel for plaintiff in error presents in his brief no additional arguments in support of his motion in arrest of judgment and may therefore be presumed to have abandoned any points raised therein which were not raised in the demurrer or the motion for a new trial.

It is respectfully submitted that the judgment of the trial court should be affirmed.

.....,

ANNETTE ABBOTT ADAMS,
United States Attorney,
Attorney for Defendant in Error.

No. 3421

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. J. BOLAND,

Plaintiff in Error,

vs.

J. E. BALLAINE,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

Messrs. BRONSON, ROBINSON & JONES, Attorneys for Plaintiff in Error,

614 Colman Building, Seattle, Washington.

CARROLL B. GRAVES, Esq., Attorney for Defendant in Error,

607 Central Building, Seattle, Washington.

Messrs. LYONS & ORTON, Attorneys for Defendant in Error,

920 Alaska Building, Seattle, Washington.

[1*]

In the United States District Court of the Western District of Washington, Northern Division.

No. 3122.

JOHN E. BALLAINE,

Plaintiff,

vs.

W. J. BOLAND, W. E. STAVERT and F. C. JEMMETT,

Defendants.

Stipulation Re Filing of Amended and Supplemental Complaint, etc.

Whereas, upon the coming on of this cause for trial on the 17th day of September, 1918, the plaintiff asked leave of the Court to file an amended and supplemental complaint, which leave was granted, and thereupon leave was granted the defendant, W.

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*Page-number appearing at foot of page of original certified Transcript of Record.

J. Boland, to file an answer to said amended and supplemental complaint, and further leave was granted to the plaintiff to file a Reply to such Answer; and,

Whereas, the defendant Boland agreed to waive the effect of the fact that this present action was instituted prior to the termination of the action in the District Court in Alaska entitled the Alaska Northern Railway Company vs. John E. Ballaine and Frank L. Ballaine;

NOW, THEREFORE, it is stipulated between the plaintiff, John E. Ballaine and the defendant, W. J. Boland, that the Answer heretofore filed by the defendant, W. J. Boland, to the complaint of the plaintiff herein shall stand as the Answer of said defendant Boland to the amended and supplemental complaint filed under leave of the Court as aforesaid, with the proviso that the defendant, W. J. Boland, expressly waives the effect of the fact that this present action was instituted prior to the termination of the action brought by the Alaska Northern Railway Company vs. John E. Ballaine and Frank L. Ballaine in the District Court of the Territory of Alaska, Third [2] Judicial District, which suit is referred to in paragraph twelve of the amended and supplemental complaint herein.

And it is further stipulated that paragraph six of the plaintiff's amended and supplemental complaint shall be denied in so far as the allegation that all of the assets of the Alaska Northern Railway Company were sold to the Government of the United States should be deemed to include whatever rights the

Alaska Northern Railway had, or claimed to have, in the lands claimed by the plaintiff herein in the Seward Townsite to belong to John E. Ballaine.

It is further stipulated that all of the allegations of the Answer to the amended and supplemental complaint shall be deemed to be denied by the plaintiff herein, without the filing of any other, or formal Reply thereto, and that the case shall be tried upon the pleadings as amended and as covered by this Stipulation.

Dated at Seattle, Washington, Sept. 17th, 1918.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for Plaintiff.
BRONSON, ROBINSON & JONES,
Attorneys for Defendant Boland.

[Indorsed]: Stipulation. Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 26, 1918. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [3]

In the United States District Court of the Western District of Washington, Northern Division.

No. 3122.

JOHN E. BALLAINE,
Plaintiff,

vs.

W. J. BOLAND, W. E. STAVERT and F. C. JEMMETT,
Defendants.

Amended and Supplemental Complaint.

Comes now the plaintiff, leave of Court being first had and obtained, and files his amended and supplemental complaint, and for cause of action alleges:

I.

That heretofore the Alaska Central Railway Company, a corporation, was organized and existing under and by virtue of the laws of the State of Washington.

II.

That said railroad corporation was so organized for purposes of constructing a line of railroad from Ressurection Bay in the Territory of Alaska to the interior of said Territory, and that said corporation did construct about seventy miles of said road, to wit: From said Ressurrection Bay to Kern Creek on Turnagain Arm, Cook Inlet, Alaska.

III.

That thereafter and during the year 1909, the said Alaska Central Railroad Company defaulted in its obligations and an action was commenced in the District Court of the Third Judicial Division of the Territory of Alaska entitled Trusts and Guarantee [4] Company, Ltd., vs. Alaska Central Railroad Company and others, and such proceedings were had in said action that a receiver was appointed and pursuant to a judgment and decree in said court and cause, all the property rights and franchises of said Alaska Central Railway Company were sold to F. C. Jemmett, Trustee, for the Sovereign Bank of Canada and other bondholders.

IV.

That thereafter and pursuant to previous contract the Alaska Northern Railway Company was incorporated under the laws of the State of Washington, the purpose for which said Alaska Northern Railway Company was organized was to take over the assets formerly owned by the said Alaska Central Railway Company and said assets were by said F. C. Jemmett, Trustee, turned over, transferred and assigned to the Alaska Northern Railway Company.

V.

That none of the stocks and bonds of said Alaska Northern Railway Company were ever sold on the market or at all, except as hereafter mentioned but were turned over to the above-named defendants, as a committee representing several banks in the Dominion of Canada, who claimed to be the owners of the stock and bonds of the said Alaska Central Railway Company.

VI.

That said above-named defendants acting for themselves and others unknown to this plaintiff sold all the assets of said Alaska Northern Railway Company to the Government of the United States by delivering and assigning all the stock and bonds of the said Alaska Northern Railway Company to the Government of the United States, reserving from said sale a tract of land near the Townsite of Seward, Alaska, consisting of about three hundred twenty (320) acres and known as the Poland Homestead, the exact [5] description of the said Polant Homestead is unknown to this plaintiff.

VII.

That the Ocean Terminus of said Alaska Northern Railway Company, formerly the Alaska Central Railway Company, is the Town of Seward, Alaska, situated at the head of Resurrection Bay, Territory of Alaska.

VIII.

That this plaintiff and Frank L. Ballaine were the owners of the tract of land on which the town of Seward is located and except the streets and alleys which were dedicated to the public, and lots which have heretofore been sold by this plaintiff and said Frank L. Ballaine, that the remaining lots owned by this plaintiff in the said town of Seward is of the value of two million dollars.

IX.

That on or about the 10th day of April, 1915, the defendants herein entered into an agreement with the Honorable Franklin K. Lane, Secretary of the Interior of the United States, and Lane acting for and on behalf of the President of the United States, as authorized by law, for the sale and purchase of that certain line of railroad extending from Seward, Alaska, to about Mile 73, northerly from said town of Seward; and the President of the United States, by virtue of his authority in that behalf, designated said town of Seward as the Ocean Terminus of a system of railways to be constructed in the Territory of Alaska, pursuant to an act of the Congress of the United States.

X.

That the designation of said town of Seward as

such Ocean Terminus of such railroad system created an active demand for lots in said town of Seward, Alaska, and greatly enhanced the [6] value of such lots, and that this plaintiff had entered into numerous agreements and contracts for the sale of lots in said townsite, and had received many inquiries and offers for lots in said Seward Townsite since said town was selected as such terminus.

XI.

That said defendants and others claim to own near and adjacent to the town of Seward, several hundred acres of land known as the Polant Tract and for the purpose of injuring this plaintiff and preventing this plaintiff from taking advantage of said demand and advance prices, and to place a cloud on the title to the property of plaintiff in said town of Seward, and prevent this plaintiff from selling this said property, and thereby enable said defendants to dispose of said land in said vicinity and thus change the center of population in said town of Seward and divert the trend of development and growth of said town of Seward to over and upon the land of said defendants, and to prevent the competition from this plaintiff, said defendants entered into said conspiracy to place a cloud on plaintiff's title to said property, and, in furtherance of said conspiracy, said defendants caused said action to be commenced, also caused to be filed in the precinct where said property of plaintiff is situated, notice of *lis pendens.*

XII.

That said defendants and others unknown to plaintiff as owners of said Polant Tract and with intent to

prevent plaintiff from taking advantage of said demand and selling said lots owned by this plaintiff and to sell lots from said Polant Tract and divert the growth and development of said town of Seward to over and upon said Poland Tract, conspired and confederated together [7] and with intent as aforesaid and to injure plaintiff and prevent plaintiff from selling his said lots and in furtherance of said conspiracy said defendants in the name of said Alaska Northern Railway Company, without probable cause and maliciously, commenced a false, fictitious and malicious suit against this plaintiff in the District Court of the Territory of Alaska, Third Judicial Division, and falsely and maliciously alleging in said suit that said Alaska Northern Railway Company was the owner of all the property of this plaintiff in said Seward Townsite, and filed a notice of *lis pendens* in said precinct where said Seward Townsite is situated, which said suit and *lis pendens* placed a cloud on plaintiff's title and prevented this plaintiff from selling his said property and taking advantage of the demand for lots in said Town of Seward caused by the Ocean Terminus of the said system of railroads under construction by the Government of the United States, as aforesaid.

XIII.

That such proceedings were had in said cause, that this defendant answered the complaint in the suit aforesaid, and issues were duly joined in said cause, trial was had, and, on the 9th day of November, 1915, the Court aforesaid made and entered, in writing, its Findings of Fact together with its Conclusions of

Law, and its final judgment whereby it was found and adjudged that the plaintiff was not entitled to relief and that the complaint of the plaintiff be and the same was dismissed, and that the defendants recover of and from the plaintiff their costs and disbursements incurred in said suit, and said prosecution was thereby fully terminated and said judgment remains in full force and effect. [8]

XIV.

That by reason of the commencement of said action and filing of said *lis pendens* many parties who had options to purchase lots from this plaintiff refused to carry out said options and pay the purchase price of said lots, and many others intending to buy from this plaintiff abandoned said intention and refused to buy said lots solely on account of said action, to plaintiff's damages in the sum of $500,000.00.

XV.

That at the time of the commencement of said action by said defendants this plaintiff notified said defendants of the loss and damages this plaintiff would sustain by reason of said action, and filing said *lis pendens,* and repeatedly offered to show conclusive record evidence that said action was groundless, without merit, and the allegations of said complaint were false, and said defendants ignored such statements and refused to dismiss said action.

XVI.

That by reason of said wrongful, unlawful, malicious and fraudulent acts aforeaid, this plaintiff has been damaged in the sum of $500,000.00, no part of which has been paid.

WHEREFORE, plaintiff prays the Court for judgment against said defendants, and each of them.

I.

For the sum of Five Hundred Thousand Dollars ($500,000.00).

For the costs and disbursements incurred herein.

CARROLL B. GRAVES,
LYONS & ORTON,
Attorneys for Plaintiff. [9]

State of Washington,
County of King,—ss.

John E. Ballaine, being first duly sworn on oath, states: That he is the plaintiff in the above-entitled action; that he has read the above and foregoing complaint, knows the contents thereof, and believes the same to be true.

JOHN E. BALLAINE.

Subscribed and sworn to before me this 17th day of September, 1918.

ELIZABETH McKERSON,
Notary Public in and for the State of Washington, Residing at Seattle.

[Indorsed]: Complaint. Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 18, 1918. F. M. Harshberger, Clerk. By ————, Deputy. [10]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3122.

J. E. BALLAINE,

Plaintiff,

vs.

W. J. BOLAND et al.,

Defendants.

Answer of W. J. Boland.

Comes now the defendant, W. J. Boland, and answering the complaint of the plaintiff in the above-entitled cause, admits, denies and alleges as follows:

I.

This defendant denies each and every allegation, matter and thing contained and set up in paragraph VIII of plaintiff's complaint herein, and particularly denies that the value of the property described in said paragraph is of the value of Two Million Dollars, and as this defendant is not sufficiently informed as to the exact value of said land he denies that it is of any value in excess of One Hundred Thousand Dollars.

II.

This defendant denies each and every allegation, matter and thing set forth in paragraph X of plaintiff's complaint, and this defendant has no knowledge as to any agreement, or contract which the plaintiff may have made as therein described, and therefore denies that any such agreements were made, or

that any inquiries or offers were received by said plaintiff as in said paragraph set forth.

III.

Referring to the allegations contained in paragraph XI this defendant is not informed as to what parcels of land other people may claim to own near and adjacent to the town of Seward, but this defendant denies that or the purpose of injuring the [11] plaintiff or preventing the plaintiff from taking advantage of any demand and advances in prices, or to place a cloud upon the property of the plaintiff, or to prevent the plaintiff from selling his land and property, or to enable the defendant to dispose of said land and thus change the center of population, and to divert the trend of the development and growth of the town of Seward to, over or upon the land of the defendants, or to prevent competition from the plaintiff, or for any other reason or purpose whatsoever, or at all, the defendants entered into a conspiracy to place a cloud upon the plaintiff's title; and this defendant further says that any action which was commenced, or filed, or any *lis pendens* which was filed in the precinct where the property described by the plaintiff is situate, was filed in good faith, and in performance of what this defendant deemed to be his duty to divers and sundry persons, for whom he acted in a fiduciary capacity; and that such action was brought in the firm belief that the same was not only justified in point of fact and in the law, but said belief was founded upon the advice of competent counsel learned in the law, to whom the facts as known and understood by the defendant herein, were

fully imparted, and upon whose advice said action was brought; that the defendant then believed, and still believes, that said action was meritorious and well founded, and that the same will be prosecuted vigorously to a final conclusion.

IV.

Referring to the allegations contained in paragraph XII this defendant denies that he with any other person, or persons, whomsoever, with intent to prevent the plaintiff from taking advantage of any demand for the sale of his property and selling his property, or for the purpose of selling lots from any [12] property owned by this defendant, or to divert the growth and development of the town of Seward over upon any other property, conspired, or confederated, with such intent as aforesaid, or at all, or to injure the plaintiff, or to prevent the plaintiff from selling his lots, or in furtherance of any conspiracy whatsoever, commenced a false or malicious or fictitious suit against the plaintiff in any court in any jurisdiction whatsoever, and particularly in the District Court of the Territory of Alaska, Third Judicial Division; and further denies that the defendant confederated with anybody else and falsely or maliciously alleged in said suit that the Alaska Northern Railway was the owner of all of the property described by the plaintiff as his own; and this defendant further says that any allegations which were made in said suit were made in the utmost good faith, and were then believed by this defendant, and are now believed by him to have been in truth and in fact correct and true; that this defendant further

denies that said suit and *lis pendens* placed a cloud on the plaintiff's title or prevented this plaintiff from selling his property or taking advantage of the demand for lots in said town of Seward.

V.

Referring to the allegations contained in Paragraph XIII this defendant denies each and every allegations matter and thing therein contained, and particularly denies that said action was not commenced under any honest claim of right, or that it was commenced without a view or hope of sustaining the allegations of the complaint, or that it was commenced in furtherance of any conspiracy whatsoever, or with an intent to cheat or wrong or defraud or injure the plaintiff herein by placing a cloud on the title of said town site, or for any malicious or wrongful purpose whatsoever. [13]

VI.

Referring to the allegations contained in paragraph XIV this defendant denies any knowledge of the matters or things set forth therein, and further on information and belief denies each and every allegation, matter and things therein contained; and denies that the plaintiff has been damaged in the sum of Five Hundred Thousand Dollars, or in any sum of money whatsoever by the action of the defendant, or anyone else, or at all.

VII.

Referring to the allegations contained in paragraph XV this defendant denies that the plaintiff notified the defendant of the loss and damage the plaintiff would sustain by reason of the commence-

ment of said action, and further denies that the plaintiff offered to show conclusive record evidence that said action was groundless or without merit and that the allegations of said complaint were false; and the defendant further alleges that the plaintiff could not have shown by record evidence that said action was groundless and without merit, and that the allegations of the complaint were false in any event.

VIII.

Referring to the allegations contained in paragraph XVI this defendant denies the performance of any wrongful, unlawful or fraudulent acts, and denies that the plaintiff has been damaged in the sum of Five Hundred Thousand Dollars, or in any sum of money whatsoever.

WHEREFORE, the defendant prays that the plaintiff take nothing hereby, and that this defendant be dismissed without day and recover his costs herein.

BRONSON, ROBINSON & JONES,
Attorney for W. J. Boland. [14]

State of Washington,
County of King,—ss.

Ira Bronson, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant, W. J. Boland, in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true; that he makes this verification for and on behalf of said defendant for the reason that said defendant is

without the jurisdiction of this Honorable Court and the State of Washington.

_____.

Subscribed and sworn to before me this 24th day of May, 1916.

[Seal] _____,

Notary Public in and for the State of Washington, residing at Seattle.

Dominion of Canada,
Province of Ontario,—ss.

W. J. Boland, being first duly sworn, on oath deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

W. J. BOLAND.

Subscribed and sworn to before me this 30th day of May, 1916.

A. C. MACDONNELL.

A Notary Public in and for the Province of Ontario.

Due service of a copy hereof admitted this 6th day of June, 1916.

SMITH, NEWCOMB & WORTHINGTON,
Attys. for Pltff.

[Indorsed]: Answer of W. J. Boland. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jul. 25, 1916. Frank L. Crosby, Clerk. By _____, Deputy. [15]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 3122.

J. E. BALLAINE,

Plaintiff,

vs.

W. J. BOLAND, W. E. STAVERT, F. C. JEMMETT,

Defendants.

Judgment.

Heretofore, on the seventeenth day of September, 1918, this action by the plaintiff against the defendant, W. J. Boland, came on regularily for trial, the other two defendants not having appeared herein either in person or by council.

The plaintiff, J. E. Ballaine, appeared in person and by his attorneys, Carroll B. Graves and Thomas R. Lyons. And the defendant, W. J. Boland, appeared in person and by his attorneys, Messrs. Bronson, Robinson & Jones. Witnesses on the part of the plaintiff and defendant, W. J. Boland, were sworn and testified in said cause.

After hearing all of the evidence, the argument of counsel for plaintiff and defendant, W. J. Boland, and instructions of the Court, the jury retired to consider their verdict and subsequently on the nineteenth day of September, 1918, returned into the court and being called, answered to their names and

say they find a verdict for the plaintiff, which verdict is as follows: [16]

"In the District Court of the United States for the Western District of Washington.

No. 3122.

J. E. BALLAINE,

Plaintiff,

vs.

W. J. BOLAND, W. E. STAVERT and F. C. JEMMETT,

Defendants.

We, the jury in the above-entitled cause, find for the plaintiff and against W. J. Boland, one of the defendants, and assess plaintiff's damages in the sum of ($30,000.00) Thirty Thousand.

W. L. COOPER,
Foreman."

Which verdict was received and ordered by the Court to be filed by the clerk in said court in this cause and said verdict was thereafter filed in said court and cause on said nineteenth day of September, 1918.

That immediately upon the announcement of said verdict by the clerk of said court, counsel for the defendant W. J. Boland, in open court, moved the Court for judgment in favor of said defendant W. J. Boland, notwithstanding said verdict, and thereafter, and on the 20th day of September, 1918, said defendant, W. J. Boland, filed in this court and cause a motion for judgment in favor of said W. J. Boland,

notwithstanding said verdict, and also a motion for a new trial herein, and the Court having heard argument of counsel for and against both of said motions, and the Court being now fully advised in the premises, denies and overrules each and both of said motions, and said verdict of said jury having been duly considered by the Court, to the overruling and denying of which motions the defendant Boland except which is allowed:

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED, by reason of the premises and of said verdict, that plaintiff do have and [17] recover of and from the defendant, W. J. Boland, the sum of Thirty Thousand Dollars ($30,000.00), together with interest thereon at the rate of 6% per annum from and after the 19th day of September, 1918, together with plaintiff's costs and disbursements incurred in this cause, taxed in the sum of $——.

Done in open court, this 27th day of November, 1918.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Judgment. Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 27, 1918. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

[Title of Court and Cause.]

Petition for New Trial.

To the Honorable Judges of the Above-entitled Court:

Comes now W. J. Boland, defendant in the above-entitled action, and now herewith, within forty-two days of the entry of judgment therein, that is, within forty-two days of November 27, 1918, respectfully petitions the Court to grant a new trial of the cause on account of the grounds and reasons hereinafter set out. This petition is based upon the pleadings, stipulations, depositions and exhibits on file and upon the stenographer's report of the proceedings at the trial, a copy of which is herewith filed and which will hereinafter be referred as the transcript. The reasons and grounds upon which this petition is based are as follows:

I.

ERRORS IN LAW OCCURRING AT THE TRIAL.

1. Errors in admission of evidence, rejection of evidence, and in refusal to strike certain testimony.

(a) The Court erred to the prejudice of the defendant in allowing the plaintiff to introduce evidence tending to show that after the suit complained of was begun, matters and things came to, or were brought to, the knowledge of the defendant which should have induced him to dismiss it. This was allowed to such a degree that the issue became "Had the defendant probable cause for keeping the suit pending?" [19] rather than, "Had he probable

cause for instituting it?" The evidence complained of will be found beginning just above the middle of page 79 of the Transcript and extending to below the middle of page 81.

(b) The Court erred in that after permitting the plaintiff to give the evidence complained of raising the issue, "Had the defendant probable cause for keeping the suit pending?" in admitting all the evidence of the plaintiff on that issue while excluding the evidence of the defendant, that is, in permitting the plaintiff to introduce evidence tending to show that the defendant acted in bad faith in not dismissing the original suit on account of knowledge which came to him after its institution, and at the same time excluding evidence offered by the defendant, to the contrary and tending to show that facts came to him after the institution of the suit which indicated that it was meritorious.

For example: On this issue the plaintiff Ballaine was allowed to testify that the defendant Boland heard Keeler give a deposition after the institution of the original suit which should have convinced the defendant that the suit was not meritorious (Transcript 79–81), while the defendant was not allowed to rebut this, and was by general ruling of the Court prevented from showing any facts apparently justifying the suit coming to his knowledge after its institution. Thus he was not allowed to testify as to what Keeler told him in explanation as to why he so deposed said explanation being made on the very day the deposition was given (Transcript, page 120). An exception was noted.

The plaintiff Ballaine was also permitted to testify that the defendant Boland was present when the bank books were examined and depositions taken tending to show that the $4,000.00 paid for the land in dispute was ultimately paid [20] by Ballaine and not out of railway funds, and that even then defendant would not, and did not dismiss the suit. (Transcript 80–81.) Yet the defendant Boland was by the ruling of the Court cut off from explaining that on the same day that these depositions were taken Ballaine admitted, that he as an officer of the Railway Company had, at one time, issued a prospectus which stated to prospective bond buyers that the townsite of Seward belonged to the Railway Company. This ruling was made on the ground that the admission was made after the institution of the suit (Transcript 116). Exception was allowed the defendant.

(c) The Court erred in ruling upon evidence as to damages. This suit is strictly and wholly analogous to the action known as Slander of Title in so far as the only damages alleged flow from the alleged false claim throwing doubts on plaintiff's title. It is the universal rule that in such actions that damage can only be recovered for actual sales prevented and so stringent is the rule that the complaint is demurrable unless the parties to whom the sales could have been but for the doubt cast on the title, are specifically named therein.

The Court therefore erred in admitting Ballaine's loose testimony as to sales prevented. In fact he had no contracts binding anyone to purchase lots

(See Transcript page 96 and particularly Ballaine's statement thereon, "They were all options"). Furtheremore these optionees were not named except the Fisher Flouring Mills (Transcript pages 73, 74), and J. H. Sears, who had an option on ten lots for a stamp-mill (Transcript 74). Ballaine had also negotiated with Mr. Fowler, wholesale grocer at Everett for the sale of twenty lots [21] (Transcript 74). Mr. Ballaine attempted to leave the impression that these options and negotiations would have ripened into sales but for the Boland suit, yet he admits, that the Fisher Mills decided to establish their business at Anchorage (Transcript 97), that Sears never did carry out his project of establishing a stamp-mill (Transcript 97), and that Fowler decided that Anchorage was the proper location for his wholesale grocery business (Transcript 98).

Instead of confining the witness to sales prevented the Court erred in permitting Ballaine to testify that he owned 600 lots and over defendants strenuous objection to testify that their sale price was depreciated fifty per cent (Transcript 70–71). There is no evidence that he could have sold a single one of them at the price he put upon them except "probably twenty" to C. B. Dodge. There is evidence only that a number of concerns hearing that Seward was to become the terminus of the Government railroad had an idea that it might become a great Alaska business center. They were not convinced that the lots were of the value Ballaine put upon them, but were willing to put up a small sum on options while they watched developments. The only ones named finally

chose other towns in Alaska in which to establish their business. There is nothing in the whole of Ballaine's testimony approaching or even approximating that certainty of proof required by the law in such a case as this. We have stated this matter at some length because the Court at several times during the trial expressed doubt as to plaintiff's theory of damage, finally indicating that he would allow this class of evidence to go in, stating that if any mistake were made, it would be rectified in considering a motion for a new trial. (Transcript 43.) [22]

(d) The Court erred in allowing the plaintiff Ballaine to testify that he had incurred the enmity of Patrick by testifying before a Senate Committee and that Patrick threatened to retaliate (Transcript 86). This was allowed on the theory as plaintiff's counsel stated that it led to the question of defendant's malice (Transcript 83). There was not a scintilla of evidence offered that Boland ever knew or heard of this alleged threat. This testimony, particularly in the absence of any other evidence indicating malice was highly prejudicial.

(e) The Court again erred in refusing to strike the testimony concerning Patrick's threat after the plaintiff had failed to show that Boland had any connection with it or ever knew of it. Defendant's motion and the Court's ruling may be found on page 107 of the Transcript.

2. The Court erred at law in refusing to grant the defendant's motion for a directed verdict at the close of all the evidence. (Transcript 129.) The

reasons given in support of the following ground are herein incorporated.

II.

INSUFFICIENCY OF THE EVIDENCE TO JUSTIFY THE VERDICT.

1. Insufficiency of the evidence as to want of probable cause.

There was no evidence indicating want of probable cause for the institution of the original suit unless the fact that it was shown that Jas. A. Haight, who represented Ballaine as attorney in the suit, believed that it was not meritorious and so told Boland before he began it, was such evidence. The fact that Boland lost the suit is not persuasive evidence on this point, nor are the strictures of the trial court in the Findings and Conclusions which ought never to have been admitted. Probable cause for the institution of an action cannot be judged by what evidence the plaintiff [23] is able to produce at a trial, but by what evidence he believes he can produce before instituting the action. Testimony may be lost or witnesses may change their stories as was done in this case. (Transcript 124.)

There was, it must be admitted, some evidence that Boland did not have probable cause for keeping the action pending. In fact, this was made the main issue of the case, but since Boland was wholly debarred from contesting that issue by the rulings of the Court, that evidence ought not to be considered.

But even if plaintiff had produced strong evidence of want of probable cause in his main case, something more was necessary. The defendant having alleged and proved by way of defense, that he

brought the action upon the advice of a great number of attorneys after in good faith disclosing to them the facts, it became necessary for the plaintiff to deny this and to support his denial with affirmative evidence. Where, in a suit of this kind, that defense is pleaded and supported by evidence no amount of evidence tending to establish want of probable cause will be sufficient to establish that want, or take the case to the jury, unless it be of a character that will tend to disprove that specific defense. The plaintiff offered no evidence whatever in support of its reply. In fact, he did not even put in a reply until after both sides had closed. (Transcript 127.)

2. Insufficiency of the evidence to establish malice.

There was no direct evidence of malice nor any from which malice could be reasonably inferred. It could not reasonably be inferred from the testimony that Patrick had threatened to retaliate on Ballaine on account of Ballaine's testimony before the Senate Committee, although there is but little doubt in defendant's mind that it was from this testimony that the jury made its inference. [24]

Nor could it, we submit, be inferred from the fact that some of Boland's associates owned a tract of land a mile or more from the business district of Seward. It will be noted that there is no evidence that Boland himself had any financial interest in this tract, and that three government tracts intervened between Ballaine's land and the tract, and it was therefore not in a location to compete with the Ballaine lands. (Transcript 100–106.)

3. Insufficiency of evidence to justify the verdict in respect to the amount awarded.

The verdict is for $30,000.00. We submit that the only tangible evidence as to damages is contained in the testimony given by C. B. Dodge. Dodge testified that he bought twelve lots in 1916 for $1,000.00 each, and that if they had not been incumbered by the suit they would have been worth from $1,500.00 to $1,800.00 in 1915. (Transcript 47.) When asked how many lots he would have bought in 1915 had the title not been clouded by the suit, he replied:

> "I didn't have a fixed definite number in my mind, but I would probably have bought in the vicinity of twenty or twenty-five lots." (Transcript 50.)

Even if the probability be taken to be the fact and even if the outside estimate as to value be used, this evidence is very far from being sufficient to justify a verdict for $30,000.00.

WHEREFORE, on the records and files hereinbefore mentioned and for the foregoing reasons, and each of them, the defendant prays the Court to grant a new trial of this cause.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant Petitioner.

Received copy of the foregoing petition on Jan. 6th, 1918.

LYONS & ORTON,
Attys. for Plaintiff. [25]

[Indorsed]: Petition for New Trial. Filed in the United States District Court, Western District of

Washington, Northern Division. Jan. 6, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [26]

[Title of Court and Cause.]

Order Denying Petition for New Trial.

WHEREAS, the Court has duly considered the defendant's petition for a new trial of the above-entitled cause, which petition was filed in this court on January 6, 1919;

IT IS HEREBY ORDERED:

1. That said petition be, and it hereby is, denied.

2. That the defendant be allowed an exception to such denial as to each of the grounds urged in said petition.

3. That the defendants' time for filing a Bill of Exceptions in this cause be extended to thirty days from the date hereof.

Done in open court this 21st day of January, 1919.

EDWARD E. CUSHMAN,
Judge.

O. K.—LYONS & ORTON.

[Indorsed]: Order Denying Petition for New Trial. Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 22, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [27]

[Title of Court and Cause.]

Defendant's Proposed Bill of Exceptions.

BE IT REMEMBERED, that heretofore and on, to wit, the seventeenth day of September, 1918, the above-entitled cause came regularly on for trial before the Honorable E. E. Cushman, Judge of the above-entitled court, plaintiff appearing in person and by his attorneys, Carrol B. Graves and Thomas R. Lyons, of Lyons & Orton, and defendant, W. J. Boland, appearing in person and by his attorney, Ira Bronson of Bronson, Robinson & Jones, and a jury having been duly empaneled and sworn, the following proceedings were had, to wit:

Counsel for plaintiff made an opening statement, stating among other things the following:

Mr. GRAVES.—This is an action nominally against three defendants but actually against W. J. Boland only, he being the only defendant served with process. It is an action to recover damages for the malicious prosecution of a civil action. We desire to make certain amendments. In the tenth line of paragraph XII of the complaint we desire to interline before the word "commenced" the words "and without probable cause and maliciously."

The COURT.—"Amendment allowed."

Mr. GRAVES.—At the end of paragraph XII we wish to add the following: [28]

> "That such proceedings were had in said cause, that this plaintiff answered the complaint in the suit aforesaid and issues were duly joined in said cause, trial was had, and on the ninth day

of November, 1915, the Court aforesaid made and entered in writing, its Findings of Fact together with its Conclusions of Law, and its final Judgment, whereby it was found and adjudged that the plaintiff was not entitled to relief and that the complaint of the plaintiff be and the same was dismissed, and that the defendants receive of and from the plaintiff their costs and disbursements incurred in said suit, and said prosecution was thereby fully terminated and said judgment remains in full force and effect."

This amendment was also allowed and said counsel offered in evidence Findings of Fact, Conclusions of Law and Judgment in Cause No. 720 in the District Court for the Territory of Alaska, Third Division, entitled Alaska Northern Railway Co., Plaintiff vs. The Alaska Central Railway Company, et al., and John E. Ballaine, et al., Defendants, which was admitted as Plaintiff's Exhibit 1, and as such is hereto attached and made a part of this bill.

The plaintiff then offered oral testimony, each of the witnesses being duly sworn, and testifying in substance and effect as follows:

Testimony of James A. Haight, for Plaintiff.

That he was one of the attorneys for John E. Ballaine, in the Alaska Northern suit against said Ballaine and others, a portion of the record of which had just been introduced. He identified his unverified office copies of the complaint in that case, and the answer of Ballaine. These were offered in evidence as one exhibit, and over defendant's objection,

(Testimony of James A. Haight.)
admitted and read to the jury. This exhibit was marked Plaintiff's Exhibit 2, and as such is hereto attached and made a part of this bill.

Counsel for plaintiff then introduced in evidence the *lis pendens* filed in the Alaska suit which appears in the record as Plaintiff's Exhibit 3, and as such is hereto attached and made a part of this bill.

Plaintiff then read in evidence his Exhibit 1 and then called the defendant Boland as a witness. [29]

Testimony of W. J. Boland, for Plaintiff.

That he was one of the defendants in the cause, by profession a barrister and solicitor, living in Toronto, Canada, and was one of a committee of three who instituted the Alaska Northern suit against Ballaine through T. C. West, an attorney practicing at San Francisco, California, who was born and educated at Toronto. That witness went to San Francisco to instruct Mr. West to bring the said suit in accordance with instructions he had received to bring the action, and gave West part of the facts upon which he drew the complaint. That he was not an officer of the Alaska Northern Ry. Co., but was one of a committee of three representing a syndicate of bondholders who owned all that was left of the Alaska Northern.

That he knew James A. Haight, a director of the Alaska Northern, and who acted as secretary of the company and as its attorney in legal matters arising in the vicinity of Seattle, and that Mr. Haight made a trip to Canada and that he discussed the Ballaine

(Testimony of W. J. Boland.)

matter with him. That he had previously had some correspondence with Mr. Haight about the matter and that Haight came to Toronto prior to Thanksgiving, 1914. That Mr. Haight did not tell him on that occasion that the records of the Company would show that John E. Ballaine paid the $4,000.00 for the homestead. Witness was asked if he had not substantially so testified in the Alaska Northern suit. Witness replied, that he could not remember his testimony but he did remember that Mr. Haight told him in his office at Toronto that Ballaine had told him that he had repaid the money which Mr. Keeler had paid out.

Witness was asked whether or not Haight had told him that he Haight, had arranged with Mr. Frost to produce the books so that Keeler could go over them, and whether or not Haight had not told him that Mr. Keeler would state that the $4,000.00 had [30] been paid by the Tanana Construction Company to Mrs. Lowell and that he Keeler, had afterward been paid back. Witness replied that they had talked about the $4,000.00 but that the conversation was not that in substance and effect. He was asked if he had not testified in the Alaska Northern suit against Ballaine, that he had had such a conversation with Haight. He replied that he did not remember so testifying, and in being asked if he would deny that he did, said, "I won't because I don't remember."

Witness said that some of the books at the time of the conference with Haight were in the possession

(Testimony of W. J. Boland.)

of Judge Landis' Court at Chicago being impounded in the Alaska Coal cases, and that he told Mr. Haight to go and see Patrick, the syndicate's attorney in Washington, who had access to them, and if he could convince Mr. Patrick he was right, Patrick would so advise them; that Mr. Haight did go to Washington, saw Mr. Patrick, and did not convince him.

Witness was asked whether he remembered giving the following testimony in the Alaska Northern suit in reply to a question by Ballaine's attorney, Mr. Haight.

"A. No, sir; I don't recollect that. My recollection of the transaction was that your views were so strong and that you were so opposed to Mr. Patrick's views, that I said to you when you were in New Jersey, why not go to Washington and see if you could not convince Mr. Patrick that his views were wrong."

The witness replied that this must be correct because that was what happened at the Toronto interview and that Haight went to Washington to see Patrick at his suggestion.

The witness was also asked whether he had not testified in the Alaska Northern suit that in the interview with Haight at Toronto he had been impressed with the fact that here was one of the Alaska Northern's attorneys, Patrick, claiming that it owned the townsite of Seward, and that they should take action to recover [31] it and another, Haight just as strongly contending to the contrary and that he was trying to get them to thresh it out and let him out as

(Testimony of W. J. Boland.)

trustee, to which he replied that he did not remember saying it, but that it sounded about what he would say.

Witness testified that he did not understand from Haight that he had seen the books and Patrick had not because Colonel Swanitz always claimed that he had the original letter-book and produced the original letter-press, and showed witness letters written by Keeler to Ballaine after the $4,000.00 payment was supposed to have been made. He also testified that he probably testified in the Alaska Northern suit that Haight suggested that they ought to get Keeler's statement.

"Q. Was this question asked and this answer given: 'Q. Was there anything to prevent Mr. Keeler going to Washington and seeing Mr. Patrick and examining the books? A. I gathered the impression somewhere, I don't know where, but I had it, in my mind, that Mr. Keeler was an adverse witness so far as we were concerned. I had that impression all the way through. I did not know at that time that Mr. Keeler was a Shedd representative. I thought he was a Frost representative, and Mr. Frost and ourselves were fighting in the courts, and Mr. Frost would not do anything for us. We were fighting right along the line.' "Is that your testimony"? A. "It may have been; I don't remember."

Cross-examination.

Mr. Haight had represented the Alaska Northern a long time but the witness did not consult him with

(Testimony of W. J. Boland.)

respect to the legal question involved but merely the facts. Mr. Haight informed the witness that he could not act for the company in such a suit because of his relations with Ballaine and subsequently while still in the employ of the company and after the suit had been instituted Haight wrote to witness that he had been offered a fee by Ballaine to [32] appear for him, and witness wrote Haight that he had no objection.

Mr. Swanitz was the chief engineer of the Alaska Northern and had been from the very commencement. He was also a trustee.

Mr. Keeler was the disbursing officer of the railroad who paid out money after the disbursement had been O. K.'d by Mr. Swanitz during what was known as the Shedd regime.

The witness was one of the three syndicate managers, and general counsel for the syndicate who represented the original bondholders of the Alaska Central Railroad who organized the syndicate and had the road foreclosed. They controlled the stock of the Alaska Northern.

Redirect Examination.

Haight came to Toronto representing Ballaine. The syndicate did not pay him.

Recross-examination.

Haight continued to represent the Alaska Northern after the Toronto visit but witness understood that he came to Toronto representing Ballaine. He

(Testimony of W. J. Boland.)
was not charging Mr. Haight with any improper action.

Redirect Examination.

Q. "What do you mean when say say, 'Here were two attorneys representing us' "?

A. "Representing the Alaska Northern Railway. Mr. Haight was our attorney, our secretary out here, paid by us."

Testimony of James A. Haight, for Plaintiff.

He represented the Alaska Northern Railroad when he called in Boland in Toronto and not John E. Ballaine and if his statements were made as an attorney at all they were made as attorney for the Alaska Northern. Having been assured by counsel for defendant that there was no objection to his testifying about his conversation with Boland he testified as follows: [33]

A. "It is a little bit hard to tell just where to begin, but the whole matter of the relations of the Alaska Central Company to this townsite had been a matter of inquiry by Mr. Boland, who, so far as I was concerned, represented all who were interested in the Alaska Northern Railway Co. I had stated to him the facts that were within my knowledge; that is, for instance: This meeting of the Alaska Central Railway Co., at which the question of the Alaska Central Railway Company's relation to the townsite came up, and at which the directors, or trustees of the Alaska Central Railway Company practically took the position that the railway company was not

(Testimony of James A. Haight.)

interested in the townsite. I don't recall when the matter of this $4,000.00 item paid by Mr. Keeler to Mrs. Lowell, and subsequently paid back by Mr. Ballaine to Mr. Keeler was brought to my attention. That transaction took place at Seward. I was the secretary and attorney of the Tanana Construction Company, of which Mr. Keeler was the treasurer. I was also secretary and attorney of the Alaska Central Railway Company; but I have no recollection of that item at the time. When that was called to my attention, I suggested that Mr. Keeler was a very important witness on that question. I have never heard that there was a resulting trust in favor of the Tanana Construction Company, or the Alaska Central Railway Company, and I felt that I was in a position to know of such a fact, and to learn of it if anybody was. I therefore suggested to Mr. Boland, either orally or in writing, that he see Mr. Keeler. I am quite confident that I mentioned that to him sometime when he was in Seattle, and suggested that he try and see Mr. Keeler when he pasesd through Chicago, because I understood that Mr. Keeler was then living at Chicago. That fall, that is the fall of 1914, I went east. Just before I went East I saw a gentleman by the name of Christensen, at the suggestion of Mr. Boland, who, there was a rumor that Mr. [34] Christensen was connected with the land department of the United States in Alaska, had said something to the effect that the Alaska Northern might have some interest in this property. And, as Mr. Boland said, I was attorney for the Alaska

(Testimony of James A. Haight.)

Northern in this vicinity, and in regard to their land holdings, their right of way. I suppose all their papers regarding the securing of the right of way through the land department, and a great many other matters regarding their land holdings were attended to by me. I went and saw Mr. Christensen, who happened to come down from Alaska just prior to my leaving for the east; and Mr. Christensen said that he had been misquoted. I, being impressed with the importance, from the Alaska Northern's point of view, and from the point of view of getting at the facts, of seeing Mr. Keeler, wrote to Mr. Frost. I was going to Chicago on my way east, and I wrote to Mr. Frost to arrange to have Mr. Keeler see me and he did. I think Mr. Keeler was living a little bit out of town. I have forgotten about that. But I saw Mr. Keeler, and he assured me that that $4,000.00 had been paid back by Mr. Ballaine, and that, to my mind disposed of that phase of the case, and I told the result of my inquiry to Mr. Boland, and suggested the wisdom of seeing him, or having his records looked up, so that the whole thing could be absolutely verified, beyond any mistake as to what the facts were."

Cross-examination.

He had no personal knowledge of the $4,000.00 entry. He was consulted about the Ballaine matter when it first came up, had had no relation with Ballaine for years and in fact had been adverse to him in many Alaska disputes. Witness was at the

(Testimony of James A. Haight.)

time getting $100.00 a month from the Alaska Northern.

Mr. BOLAND.—"I want Mr. Haight to understand that Mr. Haight did not come there at our request. I did not intend to infer, or want anybody to think that I tried to infer that there [35] was anything improper in his coming there; but we did not ask him to come there; neither did we pay his expenses, and he gave me the impression that he came there representing Mr. Ballaine."

"Mr. GRAVES.—If you are going to testify, I would rather have you get up there under oath."

Redirect Examination.

Witness cross-examined Boland in the Alaska Northern suit at Seward and remembered that Boland testified to the effect that "Here were two attorneys representing us, both of them in our employ," etc., referring to witness and Patrick. He investigated the story of the purchase of the land with company friends and inquired of Keeler who was supposed to have made the payment and told what he learned to Boland in October or November, 1914.

Recross-examination.

Witness was shown a letter written by him to Boland on October second, 1914, containing the statement "that payment of $4,000.00 was made," and expressing an uncertainty as to why it was made by the company—witness then testified as follows:

"A. Yes, sir; I did not know about that. I am

(Testimony of James A. Haight.)

quite sure I did not know about that until I saw Mr. Keeler.

Q. What did you find from Mr. Keeler?

A. I found from Mr. Keeler that he paid the money, the $4,000 to Mrs. Lowell, and that—

Q. That he, the company, paid the money?

A. Well, of course, I suppose that the Tanana Construction Company. He was disposing of the funds. The point was whether the money had been paid back, and he said it had. Of course, I did not suppose Keeler was putting any of his individual money into it, because I did not think he took any money of his own up there.

Q. You didn't find anything to persuade you that the company did not originally advance the money?

A. Well, I was satisfied that the company did originally advance [36] some money. That would be my inference from what was said there.

Q. Did you go on to Washington to see Mr. Patrick?

A. Well, I went—Now, Mr. Boland is telling the story from his point of view, of course, I was not interested in Mr. Patrick, because what we wanted to do was to get at the facts. Mr. Patrick, of course, did not know anything about this transaction; but I was expecting—my special errand at Toronto, as well as seeking to clear this matter up, was to hurry up a payment to myself of about a thousand dollars that was due, and long overdue from the Alaska Northern, and I thought I might hasten that, and I think my visit did, because en route I did receive a

(Testimony of James A. Haight.)

portion of what was due me. Then, coming back, I came by way of Washington. I was visiting a friend in West Virginia, from which point I wrote a letter in regard to this matter, that Mr. Boland must have seen, and I was about a half a day with Mr. Patrick. Mr. Patrick, who had some, I have forgotten whether they were the Tanana Construction Company, or Tanana Railway Construction books, he had a book of either one of those, or both. I think he showed me two books in which there was this item of $4,000, in both of them noted there; but the entry there was so vague that I could not make anything out about it, and I thought that it would be well for him to see Mr. Keeler, or vice versa, about that.

Q. Mr. Patrick's idea was that a resulting trust had arisen from the payment of that money by the Tanana Construction Company in favor of the company?

A. I am not sure that it was solely from that. Of course, I can't say now, but I had the impression that it was also due to Mr. Ballaine's relations as trustee, one of the trustees of the company. [37]

Q. One of the trustees of the company?

A. Probably. I am not not quite clear, but I do think that Mr. Patrick had that $4,000 item; at least I had that distinctly in mind. He was very positive in his opinion that an action ought to be brought, wasn't he?

A. I don't know whether I discussed with him the bringing of any action. I would not say that, one way or the other.

(Testimony of James A. Haight.)

Q. You were impressed with his opinion that there was a right of action?

A. Mr. Patrick was a gentleman of very positive views on anything he did.

Q. He had a positive view that there was a right of action. You haven't answered the question.

A. I would say, "yes."

Q. You would say it?

A. Yes."

Redirect Examination.

Witness could not recollect whether or not he told Mr. Patrick that Keeler had told him that the money had been repaid. Mr. Keeler was representing the Shedd Interests and was acting Treasurer of the Tanana Construction Company—and would naturally have the books. But witness saw two large books in Mr. Patrick's possession, one of them the Alaska Construction book "and I had the impression that the other was the Tanana Construction Company."

Testimony of C. B. Dodge, for Plaintiff.

That he had resided in Seattle since 1901, and was a dealer in real estate and had been in that business since 1890. He arrived in Seward May 18, 1915, having gone there to speculate in real estate following the announcement of the government road. He tried to get at the value of every lot in Seward and made a complete abstract of the part south of Seward Creek, intending to buy close in [38] property.

He purchased two lots on Fifth Street and two

(Testimony of C. B. Dodge.)

on Fourth Street. He went to the Commissioner's office and read the *lis pendens* in the Alaska Northern suit against Ballaine. He was asked what effect the suit had on the value of the property described in the *lis pendens* whereupon the defendant objected on the ground that it was incompetent, irrelevant and immaterial and not the proper measure of damages. Whereupon the following discussion was had.

"Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant, and not a proper measure of damages.

The COURT.—I will hear from you Mr. Lyons.

Mr. LYONS.—The purpose of this, if your Honor please, in the nature of things, the only way to show the damage that Mr. Ballaine has sustained is to show what effect this *lis pendens* had on his property, and what the value of other property in the same vicinity was selling for, and if it was impossible for him to sell it at that time, and if we can show later on, the prices. If we can show the prices that he could have sold it for at that time, and the prices that he could have sold it for later on, we can then show the damage that he sustained by reason of the filing of this suit.

The COURT.—Are you not going to be confined to special instances?

Mr. LYONS.—Well, if your Honor please, we can show special instances, if we are permitted to; but it seems to me that if we can show that there was a demand at that time for other lots in the same vicinity, and that Mr. Ballaine's lots could not be sold because

(Testimony of C. B. Dodge.)

his title was clouded, then the special instance that we can show will enable the jury to infer what were the losses from other lots that we can't specifically deal with.

The COURT.—That is, you expect to contrast, to use that as part of your evidence, the contract, between what lots were selling for [39] that were unaffected by the suit.

Mr. LYONS.—Yes, your Honor.

The COURT.—Either what he had to take, or what he could not get for the lots that were affected.

Mr. LYONS.—Yes, your Honor.

The COURT.—And coupled with that evidence those that were similarly situated?

Mr. LYONS.—Yes, if the Court please.

Mr. GRAVES.—Of course, it can't all be introduced in the same breath, but we expect to show that this deterioration of prices extends down to the present time. Of course, that makes the loss direct at the time of the bringing of the suit.

Mr. LYONS.—We expect to show also, if your Honor please, that the order of the President at that time making Seward the terminal gave an impetus, or gave value to property there that it may not have at this time, and may never have again, and the plaintiff at that time could, and would have disposed of his property, and that he can't dispose of his property for the same price now.

The COURT.—Are you sure that we are not left to speculate that he might not ultimately get more for it than he would at that time?

(Testimony of C. B. Dodge.)

Mr. LYONS.—It seems to me, if your Honor please, that in response to that, that is a matter of speculation as to what may develop in the evidence. If we can show that it had a certain value at that time, and that he was prevented from selling it by reason of the suit, and now when the suit is blotted out that he can't sell it for those prices, it seems to me we could not be expected to indulge in speculation as to what its value may be in the future.

The COURT.—I am aware of the fact that you are getting on dangerous ground, but to stop in the middle of a lawsuit and try to find the right line is hardly as satisfactory as to take plenty of [40] time on the matter. If there is any mistake made in the admission of this testimony it will have to be rectified on the consideration of a motion for new trial when it becomes necessary. The objection will be overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed."

The witness testified that he knew the effect that the filing of the *lis pendens* had on him and that he remained at Seward a little more than two months and that he eliminated the Ballaine property on account of the suit in making up his abstract. He purchased six lots of Colonel Blethen on Fourth St. though Mr. Ballaine had lots on the same street that he would have preferred had it not been for the suit; there were two or three worth $3,000.00 apiece. "Q. Did you subsequently, at any time, make any

(Testimony of C. B. Dodge.)

other purchases of lots from Mr. Ballaine in the townsite? A. I did.

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant, what he did purchase.

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed."

Witness answered that in the fall of 1916 he purchased twelve lots.

"Q. What did you pay for those lots?

Mr. BRONSON.—I object to that as being incompetent, immaterial, and irrelevant.

Mr. LYONS.—I want to show, if your Honor please, what he paid for those lots, and what the value of the same lots were when the suit was first brought?

The COURT.—The objection is overruled.

Mr. BRONSON.—Note an exception. [41]

The COURT.—Exception allowed.

A. I paid $1,000.00 apiece, $12,000.00 for the twelve lots."

Witness testified that in 1915 those lots would have been worth from $1,500.00 to $1,800.00 each.

Mr. BRONSON.—We object to all of this as not a proper measure of damages, or the way to arrive at the result which the plaintiff has in mind, so as to save encumbering the record.

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed."

(Testimony of C. B. Dodge.)

The witness was asked to state whether there was any demand for lots in May, 1915. The defendant objected that the answer would not be relevant on the measure of damages and said objection being overruled the witness answered that a dozen men went up on the same boat with him to buy lots. That about five-twelfths of the townsite was included in the suit, and a number of sales were made in the area not covered by it.

"Q. Can you state whether or not Mr. Ballaine could have disposed of any considerable number of lots at that time?

Mr. BRONSON.—I renew the objection, because it is necessary to make it definite in some form.

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed."

Witness answered that he would have bought a great many more lots of Ballaine but for the suit; that some of his associates would have done the same thing and he heard others state that they would.

"Q. How many lots were you yourself prepared at that time to purchase from Mr. Ballaine, had his title not been clouded by that suit?

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant. [42]

The COURT.—Objection overruled. Exception allowed.

A. I didn't have a fixed, definite number in my mind, but I would probably have bought in the vicinity of twenty or twenty-five lots.

(Testimony of C. B. Dodge.)

Mr. BRONSON.—I move to strike out the answer as not definite. The witness says he does not know. He is speculating on what he probably could have done.

The COURT.—The objection is overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Allowed."

Witness further said that he went to Seward with the intention of purchasing a considerable number of lots. That Ballaine arrived there about May 25 or 26 and that he made it a fixed policy not to buy anything of Ballaine except such lots as were not clouded by the Alaska Northern suit.

Cross-examination.

That he did not pay cash for the lots bought of Ballaine. That he bought an improved lot for $4,500 cash, and other unimproved for $2,500 cash and two others for $4,400. That he took up between eighteen and twenty thousand dollars to invest, and a letter to the bank authorizing him to use more.

Witness further said he did not know what proportion of the area unaffected by the suit was sold in 1915 but that there were a great many lots sold.

Testimony of J. E. Ballaine, in His Own Behalf.

The plaintiff testified that he was the principal defendant in the Alaska Northern suit, and that he had resided in Seattle about thirty-nine years. That the complaint in that case was wired to Alaska and he was first informed of it by seeing an account of it in the "Seattle Times" under great flaring headlines. The suit was filed April 29th, 1915, and witness ar-

(Testimony of J. E. Ballaine.)

rived in Seward the latter part [43] of the following May. That he was the founder of Seward, and the person most largely interested in the townsite, owning about six hundred lots.

Resurrection Bay is about six hundred miles west of Juneau, but in an air line about one hundred and seventy-five miles west of Cordova. It extends north into the land about twelve miles and Seward is situated at its northwestern corner and was designated by the President of the United States as the ocean terminus of the Government railway.

The witness was familiar with the demand for and value of lots in Seward at that time. The principal business street was Fourth Avenue, on which the witness owned approximately sixty-five lots. The witness was asked what the value of the lots would have been at that time if it had not been for the Alaska Northern suit. Objection was made and plaintiff's counsel stated his theory of damage as follows:

"Mr. GRAVES.—The method by which we will arrive at any depreciation of value, I was proposing to suggest by further question. But we can prove the character of that property, and the value of it at that time. It would be like arriving at the measure of damages regarding real estate at any other place. You can certainly get the value of it at a certain time for the purpose of contrasting the rise in price, or depreciation in price, causing the difference between the property which he had at that time. Of course, we must go further and show how much of

(Testimony of J. E. Ballaine.)

that was sold. I propose to show transactions and contracts for the sale of that property."

The witness testified that he had had talks with prospective buyers before the suit was brought and was acquainted with the values of those lots.

"Q. What would you say was the value of those lots? [44]

Mr. BRONSON.—I renew my objection, if your Honor please.

The COURT.—It is a very doubtful question, but I will overrule the objection.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed."

The witness testified that he had offers of $3,000 for lots in Block 15 facing Fourth Avenue, and for lots in block 16 practically the same price.

"Q. In those two blocks, how many lots did you have?

A. I think about twelve. In the block next north, or the tiers of blocks north of that, the lots held by other persons whose title was not affected by this suit sold at $2,000.00; that is to say that the tier of lots—

Mr. BRONSON.—I object to that and move to strike out the question and answer. By the question it is impossible for me to anticipate the form in which he is going to answer those questions.

The COURT.—The motion is denied. Exception allowed."

That in his opinion, lots in Block 23 were worth $2,000 for inside lots and $2,200 or possibly $2,500

(Testimony of J. E. Ballaine.)

for corners; in block 24 across the street practically the same price; in the block north of that about $1,500. That he had an offer of $4,000 apiece for two lots adjoining the site bought by the city for the city building.

"Q. How many of those lots bore the value of $2,000.00 that you owned?

A. About twenty-six. I want you to understand that I am giving this from my best recollection. If I had known that you were going to ask these questions I could have had my books here, and given you the exact number, but that is not more than one or two from the exact.

Q. About how many lots, to the best of your recollection, had the value which you placed at $1,500.00? [45]

A. About the same number, twenty-six. Then there was another tier of blocks still beyond that.

Q. What value?

A. A block there, the lots in that, had the value of about $1,200.00."

There was another tier of about sixty-five lots worth about $1,200 each. That the values on Adams Street were about 25% less than on Fourth Street, and that he owned relatively the same number of lots on each. That he owned a few more lots on Third than on Fourth, and their value was about fifty per cent of the Fourth Avenue lots. The foregoing were on business streets.

"Q. What do you say as to the value of other lots in the townsite. Do you own other lots other than

(Testimony of J. E. Ballaine.)

those which you own on Fourth, and Third, and Adams? A. The values block by block—

Q. I would rather you would give it an estimate by the streets, if you could, or generally; that is, I think that you would come to the nonbusiness lots to a certain extent.

A. On First Avenue, extending from the bay up to Lowell Creek, or Jefferson Street, which is about half way through the town, the values were approximately about $800.00 for inside lots, and $900.00 to $950.00 for corner lots. On First Avenue north of the— Well, I will say, first, south of Lowell Creek because Lowell Creek is the dividing line really which separates the present business district from the rest of the town. On second Avenue, the next east of First from the bay is Jefferson Street, which is about half the length of the town, the values were about a thousand dollars, and on Third about $2,000.00. On Fourth, $4,000.00; on Fourth, $4,000.00 between Washington Street and Adams, which would be the first tier of lots next to the water front; about $3,000.00 between Adams and Jefferson, except two lots adjoining the site of the city building. Then on Fifth [46] Avenue, the one directly east of Fourth, the values were about $3,000.00 a lot. Some were purchased actually for $3,000.00 a piece. On Sixth Avenue, about $2,000.00. On Seventh and Eighth Avenues, about $2,000.00 apiece up to Jefferson Street. Now there was a little variation in the values of those lots. I am giving the average.

(Testimony of J. E. Ballaine.)

Q. That is what I want.

A. Some lots, for instance, close to some important business house, close to the postoffice, or close to the railway headquarters building, had a little higher value by reason of their location than other lots exactly similarly situated in another block, for instance; but I am giving the average. In the tiers of lots north of Jefferson Street the prices naturally shaded off as they got further from the business district, the present business district. About in the first tier of lots they would shade off about 33 per cent, beginning on First and continuing, Second, Third,—33 per cent of the values that obtained south of Jefferson Street. Then in the next tier still north of that, there would be another drop of about 25 per cent with some exception. One of those exceptions is in the tier of lots on Third Avenue north of Jefferson Street, where there are quite a number of the best residences in Seward. The lots there are higher in value, or were, than they were in south of Jefferson Street, by reason of that fact. Then another tier of lots on Second Avenue, where a slight knoll existed, and which gave them an elevation over all other property was still higher. That was a little local and exceptional condition which gave a special value to those; but the general rule was that each tier of lots took a step lower as they got away from the business district in value.

Q. With that estimate which you have made as to the values, basing [47] it upon the facts that you have detailed to the jury, and have given the value of

(Testimony of J. E. Ballaine.)

those lots in the then present business district, what was the value of those lots lying farthest out, and which you placed the lowest value on; what would that value be at that time?

A. The value was about $500.00 a lot; probably the lowest, about $400.00. In the case of about five or six lots, that were deep down into a depression, in the extreme northwestern corner, the value was about $350.00 for five or six lots."

The witness arrived in Alaska the latter part of May. The *lis pendens* was filed on the first day of May.

"Q. After the filing of this suit Mr. Bellaine, were you able to sell those lots at any price?

A. I was not.

Mr. BRONSON.—I object to that, if your Honor please, as being incompetent, immaterial and irrelevant and not tending to establish the proper measure of damages in this case.

Mr. GRAVES.—If counsel will suggest the proper measure.

The COURT.—The objection is overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

A. After the filing of the *lis pendens* I was unable to sell any of my property at any price, and during the pendency. The *lis pendens* was filed in the record at Seward on the first day of May. It remained on record clouding all my title all through the summer of 1915. The case came to trial, and the Judge—

Q. I think that is already in the evidence, Mr.

(Testimony of J. E. Ballaine.)

Ballaine. Since the judgment dismissing the case, and since the time for appeal expired, have you had occasion to determine the value of those lots?

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant, and not the proper measure of damages. [48]

The COURT.—Objection overruled. Exception allowed.

Mr. GRAVES.—I am not particular about urging it over the objection of counsel.

The COURT.—Then the question is withdrawn, is it?

Mr. GRAVES.—I think it is a matter that the jury ought to have.

Q. You may state, under the ruling of the Court.

Mr. BRONSON.—The question is not withdrawn? If not, then my objection stands.

Mr. GRAVES.—I will renew the question. Just read the question again, Mr. Stenographer.

Q. (The original question read.)

A. I have.

Q. So as to abbreviate it, you having enumerated the different classes of your lots, has that price been greater, or less than the value that you placed upon the lots.

Mr. BRONSON.—Ask him for the prices.

Mr. GRAVES.—I am asking as to his judgment of the value.

A. My judgment of the values may be shown by the fact.

Q. You can only make up your judgment as to the

(Testimony of J. E. Ballaine.)

market conditions, and sales, and the like. You are familiar with those, are you? A. Yes.

Mr. BRONSON.—I make the same objections as to the preceding question.

The COURT.—Objection overruled. Exception allowed.

Q. Have you in mind my question? Was it greater, or less? A. Much less.

Q. Now, having in mind the values which you placed in your judgment that this property bore prior to this suit, what would you say that value was after the termination of that suit, as I have heretofore asked you?

Mr. BRONSON.—I object to that as incompetent, immaterial and irrelevant, and not the proper measure of damages. [49]

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

Q. That is, if you can state it in percentage.

A. All through the summer of 1915, while—

Mr. BRONSON.—That is not the question.

Q. I am asking you since that time.

A. Well, during 1916, after the determination of the suit, there was still the period of appeal.

Q. That was included in my other question. State since the time for appeal expired.

A. That would be since November 9th, 1916.

Q. Yes, sir.

A. There has been no market at all for the property there.

(Testimony of J. E. Ballaine.)

Q. Have there been any sales in any quantity that you knew of?

A. None in any quantity. There have been a few small sales.

Q. From sales that have been had, what would you say were the values upon those lots that were sold?

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant, and not the proper measure of damages.

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

A. Generally about 50 per cent below the values at which property was selling in 1915.

Q. Mr. Ballaine, at the time of the initiation of this suit, the commencement of this suit, in April, 1915, didn't you have contracts or agreements? I don't care if they were in writing, or agreements for sale that had not been consummated.

Mr. BRONSON.—I object to that as leading, incompetent, immaterial and irrelevant, and not tending to establish the proper measure of damages. [50]

The COURT.—Do you propose to follow that up with some evidence of the breach of this contract?

Mr. GRAVES.—My purpose,—I will state to your Honor, is to show some special instances in which there was a direct loss upon some of these lots.

The COURT.—If so, the contract, as I understand the decisions,—you can bring a right of action on the contract.

(Testimony of J. E. Ballaine.)

Mr. GRAVES.—It is not for the purpose of showing written contracts, but he had offers which he had accepted, of sales which were not afterwards carried out by reason of this.

The COURT.—Being concerning real estate, and oral, they were not within the statute?

Mr. GRAVES.—Yes, sir.

The COURT.—Objection overruled. Exception allowed.

A. I had entered into quite a number, I should say, between twenty and thirty, offhand, of contracts, either in writing, or verbal, oral, not contracts; some of them were in the forms of options, and prospective purchases, in some cases, by taking an option on certain property at a certain price, and they paid down on the option. They were not obligated to carry through their purchases.

Mr. BRONSON.—I renew the objection and move to strike out the answer, showing that there is nothing definite, and only preliminary.

The COURT.—I assume that it is preliminary, and he is intending to follow it up with something definite. The objection is overruled. Exception allowed.

Q. Were those agreements carried out by the parties, or were they abrogated?

A. They were abrogated immediately on the filing of this *lis pendens.* [51]

Q. Now give us a special instance of some sales in which you had offered to sell, and the other parties that offered to buy, and the prices fixed?

(Testimony of J. E. Ballaine.)

Mr. BRONSON.—I make the same objection to that as to the previous question.

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

A. One instance was the Alaska representatives of the Fisher Flouring Mills Company here in Seattle, took an option.

Q. Just state the lots and the prices, is all I want, and the parties.

A. An option on one lot, and three small fractions adjoining in the southeast corner of block 1, for $4,000.00. They paid down an option of $100.00. As soon as the *lis pendens* was filed they notified me that they would not take up the option on that account, that the title was clouded.

Q. Any others?

A. J. H. Sears, who had gone to Seward ahead of me, representing New York interests, had taken an option on the tier of lots in block 20— No, it is the block just north of 19. I can't quite place the number of it. It is just north of 19 on Railroad Avenue. He had taken an option on a tier of lots facing Railroad Avenue on which to erect a stamp-mill, and he had come out to engage in mining enterprises. They were to put in the sampling works and stamp-mill at that place. It was right along the railroad, and the ore could have been delivered direct from the cars. That option was not carried out after the filing of the *lis pendens.*

Q. Do you recall the prices that were agreed upon?

(Testimony of J. E. Ballaine.)

A. My recollection is that the prices there,—I made them a special price of a thousand dollars a lot. [52]

Q. How many lots?

A. I think there were ten in that group.

Q. Generally speaking, can you give us your best recollection, the number instances, not particularly the number of lots but the number of instances in which you had contracts, or options for sales, which were not taken up?

A. I had negotiated with Mr. Fowler, a wholesale grocer in Everett—

Q. Without naming special instances, can you tell me about how many, just the number?

A. Probably not less than twenty, and not more than thirty. It is so long ago that I would not attempt to say.

Q. What became of those agreements?

A. They were all dropped immediately on the filing of the *lis pendens.*

Q. What would you say, roughly speaking, was the number of lots that were covered by those 20 to 30 agreements?

A. I was in negotiations with different persons during the period before the filing of this suit for sales which would have covered in all not less than 200.

Mr. BRONSON.—I think this has merged now into the realm of speculation to the last degree.

The COURT.—I do not think he is answering the question. The objection is sustained. You were

(Testimony of J. E. Ballaine.)

asked about options that were dropped, how many lots that that covered.

Q. (Mr. GRAVES.) Just answer that first as to the 20 or 30 on which you had agreements.

A. Orally, or in writing?

Q. Either written or oral.

A. Well, of course, the oral agreements were in such varied stages of completion, or partial completion, that it would be hard to draw the line on them. Those that were in writing, I could give you the approximate numbers. [53]

Q. I will ask you this then: What were the numbers of lots that were involved in contracts, either in oral, or in writing, and involved in offers which had been made to you to purchase, but the negotiations had not yet concluded, and in which the negotiations ceased upon the filing of this suit?

Mr. BRONSON.—That is objected to as being wholly speculative, and problematical, and it is incompetent, immaterial and irrelevant.

The COURT.—The objection is overruled. Exception allowed.

A. Well, I had given definite options in writing on about not less than thirty lots up to the time before I left Seattle for Seward. That is to say, before the filing of the suit, and between the time of the President's official designation of Seward as the terminus of the railway system on the 10th of April, and the filing of the *lis pendens* on the 1st of May, twenty days, I had entered into definite options, or given definite options, on not less than thirty lots.

(Testimony of J. E. Ballaine.)

Q. Were those lots in the business part of town?

A. Yes, sir, those were in writing.

Q. Were they largely in the business part of town as you have heretofore described it?

A. All but this group to Mr. Spears, when he had contemplated putting up the sampling, or concentrating mill. That might be described as being just outside of the business district, except that it was on Railroad Avenue. He wished a site where the cars could deliver ore direct to the property.

Q. In addition to those, had you entered into negotiations with parties who were offering to purchase lots? A. I had.

Q. How many of that character?

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant, and not a proper measure of damages. [54]

The COURT.—Objection overruled.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

A. I don't remember the number so definitely as I remember the people I was undertaking to locate there, some large instances.

The COURT.—He did not answer about the number. If you can't answer say so.

A. I would not attempt to give the definite answer as to the number, because people were calling me up by telephone every day.

Mr. BRONSON.—If you can't answer say so.

Q. (Mr. GRAVES.) Were you, before the institution of this suit, inquired of regarding those lots,

(Testimony of J. E. Ballaine.)

and regarding sales? A. I was.

Q. By prospective purchasers?

A. Yes, sir, by great numbers every day; probably not less than twenty or twenty-five people every day.

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled. Exception allowed.

Q. After the institution of this suit were those negotiations resumed by the parties?

A. No, sir, none of them, not in a single case. No one of the written options was exercised."

Witness first became interested in the townsite in August, 1903. He and his brother had owned it ever since and prior to the institution of the suit. Neither the Alaska Northern or the Alaska Central had demanded it or a settlement concerning it, directly or indirectly. He had known Boland only slightly and casually prior to the bringing of the suit; had never met Stavert and had met Jemmett probably half a dozen times. Witness had been interested in the Alaska Central Railway at its beginning and was a director. [55]

"Q. Between the commencement of that Alaska Northern suit, and the time of its trial, had you ever any talk with Mr. Boland, or either of the other defendants, or any of them?

Mr. BRONSON.—I object to that as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled. Exception allowed.

(Testimony of J. E. Ballaine.)

A. I did.

Q. With whom? A. Mr. Boland.

Q. Where?

A. Several different places. I wired him immediately on my notice that this suit had been filed, I wired Mr. Boland and Mr. Jemmett offering to open my books and have the books of the bank and the railway company opened to their inspection to prove the falsity of all their charges. That was within a day or two after the announcement in the 'Times' that the suit had been filed. The first time I met Mr. Boland in person after the filing of the suit, as I recall it, was in New York, in about July,—no, about August, sometime in August, when we took the deposition of Mr. Keeler, who had been the dispursing agent for the Shedds, and the treasurer of the Tanana Construction Company when I owned the controlling interest in the Construction Company, and I there renewed my offer to Mr. Boland to open my books and have the books of the companies, and the books of the banks, opened to his inspection, or the inspection of anybody who he might appoint to approve the entire falsity of all their charges, and they are complete, and Mr. Boland was present as the representatives of the plaintiffs, the Alaska Northern, at the taking of the deposition of Mr. Keeler in New York, when Mr. Keeler explained in detail the matter of the payment of this $4,000 was subsequently submitted to the Court in Seward. Then subsequently, in about the fore part of October of the same year, Oh, no, in the latter [56] part of Sep-

(Testimony of J. E. Ballaine.)

tember of the same year, Mr. Boland arrived in Seattle, enroute to Valdez and Seward, to attend the trial of this case. We then took the depositions of bankers here in Seattle, who had kept the accounts of the Alaska Central, and the Tanana Construction Company, and of my personal accounts. During the taking of the depositions the bank books were all open to the inspection of Mr. Boland. I invited him to call for anything he wished to call for, but reserved nothing. I offered to produce every document that he required, to prove the falsity, and that invitation was never acted upon by him at any time.

Q. He was present when Mr. Keller gave his testimony?

A. He was present as the local representative, the attorney for the Alaska Northern, and appeared as such.

Q. What was your purpose in offering this information of Mr. Boland, prior to the trial of the suit?

A. My purpose was to avoid the losses that the suit was causing me, the financial losses, and to show my good faith in proving that they were entirely wrong in the allegations that they made in their complaint.

Q. After you had given this information to Mr. Boland, opened those sources of information to him, which you have mentioned, did he dismiss the suit?

A. He did not.

Q. It was prosecuted until the final judgment was entered, which was read in evidence yesterday?

A. It was.

In the taking of the depositions here in Seattle, for

(Testimony of J. E. Ballaine.)

the banks, and in the taking of Mr. Keeler's disposition, the bank books were opened showing the transfer to my personal account, to the account of the Tanana Construction Company, of this $4,000.00. [57] In the taking of these depositions that was also shown that my brother who represented me at Seward had gone to Juneau, and was taken sick, and was in the hospital sick in Juneau when this note came due, and I was in the east, and knew nothing of his sickness, and consequently—

The COURT.—You are not going into the merits of the other suit, are you?

Mr. GRAVES.—I don't want to go into that. That is all covered by the findings."

At the time negotiations were on to sell the Alaska Northern to the Government the witness appeared as a witness before a committee of Congress and also before the Secretary of the Interior. The witness was asked whether or not he had not made statements on these occasions showing a different value for the Alaska Northern than its owners were claiming. The Court sustained defendant's objection to this question and the following statements were then made:

"Mr. GRAVES.—If your Honor please, my reason for tendering this is to show the circumstances that would lead to the question of malice, that upon the attitude assumed by this plaintiff, that there is a fair opportunity for the Court and jury to draw the presumption that retaliatory measures were taken by means of this suit. If your Honor will bear with

(Testimony of J. E. Ballaine.)

me for one second, I make the statement to the Court that I expect to follow it up.

Mr. BRONSON.—This is an attempt on the part of the plaintiff in this case to prove our malice by his acts. I do not question for a moment that he can prove our acts to show bad faith, but I never heard anybody heretofore try to prove our bad faith by showing his action toward us. That is what he is attempting to prove here now. He is attempting to show that he did something that we probably did not like. That is what it amounts to.

The COURT.—The objection is overruled.

Mr. BRONSON.—Note an exception. [58]

The COURT.—Exception allowed. But, gentlemen of the jury, it is a great deal like a conversation. You can't understand what one man meant unless the Court lets in what the other man said. So, here the Court is going to allow Mr. Ballaine to answer the question, but it has no bearing on what he said, except as it explains what Mr. Boland later on said. Exception allowed."

Witness said he knew George H. Patrick and that he was a professional lobbyist before Congress representing the Alaska Northern when the road was sold to the Government and that he made a certain statement to witness after witness had appeared before the House and Senate Committees and showed from the books that the costs of certain parts of the road were about fifty per cent less than claimed by the Alaska Northern.

"Mr. BRONSON.—I make the same objection. I

(Testimony of J. E. Ballaine.)

don't concede that counsel has tied up Mr. Patrick in such a way as to authorize him to make statements for Mr. Boland, and Mr. Stavert, and Mr. Jemmett.

The COURT.—The objection is overruled; but, gentlemen of the jury, you will understand that there has been some evidence here, conversation by Mr. Boland, referring to Mr. Patrick, and also testimony by Mr. Boland referring to Mr. Patrick. Unless Mr. Patrick was at this time, or the man that he contemplates testifying about, was acting for, or with Mr. Boland, you will disregard entirely the answer."

* * * * * * * * *

"Q. Is this George H. Patrick that you referred to the same Mr. Patrick that Mr. Boland claims to have advised Mr. Boland to bring this action?

A. The same Mr. Patrick, yes, sir.

Q. Did you afterwards, after these statements which you have made, did you have a conversation with Mr. Patrick? A. I did. [59]

Q. What did he say?

Mr. BRONSON.—I renew my objection.

The COURT.—Objection overruled. Exception allowed.

A. He asked me to desist from my showing before the committee to the effect that the cost of the railroad was less than the cost that he, Mr. Patrick and Mr. Jemmett, who was with him in Washington, were representing. They had represented the property to cost about $6,000,000, as it was said, and Colonel Swanitz was at the same time in Washington making some representations—

(Testimony of J. E. Ballaine.)

Q. Go right to the conversation of Mr. Patrick. What did Mr. Patrick say to you?

A. Mr. Patrick told me very angrily that unless I did desist that they would retaliate in a way that I would feel. Those were his exact words.

Q. What time was that with reference to the time of the commencement of this suit?

A. This conversation with Mr. Patrick, it was with Mr. Patrick and Colonel Swanitz together, about the middle of May, 1913. It was a little earlier than that. It was about May 10th, of 1913."

Cross-examination.

Witness severed his connection with the Alaska Central in 1908. He acquired the information given the Congressional Committees while a director. He did not think Patrick ever practiced law in his life but that he was a professional lobbyist getting $100.00 per month from the Alaska Central. Colonel Swanitz, the chief engineer, was trying to gouge the Government for about $3,000,000.00 by overvaluing the road.

In August, 1903, an arbitrary value was put on four blocks of lots, $750 for inside lots on Fourth Avenue and $1,000 for corners, or about $20,000 per block. That the four blocks were valued in the [60] aggregate of about $50,000. The filing was made in August, 1903, and patent issued in May. The witness was asked whether or not he had not paid the Government $3,000 and $4,000 had already been paid by the Railroad Company or the subsidiary construction company for the relinquishment and replied

(Testimony of J. E. Ballaine.)

that this was not the fact at all. Plaintiff's counsel objected to going into the matter on the ground that it was all shown in the Finding and Conclusions in the Alaska Northern suit already in the record as Plaintiff's Exhibit I. Defendant's counsel stated that he wished to show that there was probable cause for the Alaska Northern suit by showing that the company paid more than half the purchase price of the land just before the said values were put on. Counsel for plaintiff renewed his objection and added:

"Mr. GRAVES.—As a further fact, I would state too, as a part of my objection, and that is, it is our contention, and so stated, as I understand to be the law, that want of probable cause is conclusively presumed where there has been a favorable decision in the suit."

"The COURT.—I don't agree with Mr. Graves in that."

The Court, however, held that these matters could not be inquired into on the ground that they had been conclusively established by the former suit and the line of inquiry was shifted to the matter of sales testified to by witness.

"A. I arrived in Seward in the latter part of May, 1915.

Q. Did anybody represent you in the matter of sales previous to the time you went up there?

A. No, sir, I hadn't made any sales up there.

Q. You had no sales in process previous to the time when you arrived up there?

(Testimony of J. E. Ballaine.)

A. The sales I made, or contracts for sales, were here in Seattle.

Q. You made sales here in Seattle? [61]

A. Yes. My efforts were at that time to locate in Seward several large establishments that would be permanent there.

Q. I am coming to that in a minute. All those trades that you spoke of were in Seattle?

A. Yes, sir.

Q. Did you enter into contracts with people in Seattle to sell those lots? A. Yes, sir.

Q. And did they pay you a part of the purchase price down? A. They did.

Q. And agreed to pay the balance of the purchase price on future payments?

A. No, sir; most of those were options.

Q. Were all of them options? Were they all options? A. They were all options at that time.

Q. In other words, they were agreements in which the vendee could conclude if he wanted to?

A. I think I must claim that one of those was by cable from Seward. The others were here in Seattle, and one was consummated by cable between Seward and Seattle.

Q. Did you take substantial payments down on those options?

A. The usual amount of an option.

Q. What was that?

A. About five per cent, is the customary amount.

Q. Over what time would those options be extended?

(Testimony of J. E. Ballaine.)

A. If it is material, I think I can get the original options here.

Q. I want you to give it approximately.

A. Usually about thirty, sixty, and ninety days. I don't think any two of them were for the same period. It would give people time to go up and look over the property and see the location.

Q. Were those options all by people who would go up and look at the property before they completed the trade? [62]

A. Yes, sir, except in the case of the Fisher's Flour Mill Company. Their representative was already at Seward.

Q. Where did they afterwards establish their place up there?

A. None of them established in Seward.

Q. Didn't the Fisher Flour Mills buy any place up there?

A. I have heard that they have headquarters at Anchorage, but I don't know about that.

Q. They did not, as a matter of fact, establish any place of business in Seward? A. Not in Seward.

Q. What about those people from New York that were going to establish a stamp-mill, did they establish a place? A. No.

Q. They did not?

A. No. Mr. Fowler did; but Mr. Fowler didn't buy at Seward. He went to Anchorage, and put in his wholesale house there.

Q. Why did he go to Anchorage?

A. He never gave me any explanations as to why."

(Testimony of J. E. Ballaine.)

Witness sold some lots to C. B. Dodge in the fall of 1916, at $1,000 each on terms of 20 per cent down and 20 per cent a year. The last payment was still due; Seward was designated as the terminus of the Government road by the President about April 10th.

Redirect Examination.

The witness was asked where the so-called Poland tract was with reference to Seward.

"A. The Poland tract—Seward is on a little bight of land that goes out from the mountains, and the head of the Bay extends on about a quarter of a mile north of the north line of Seward, possibly a half a mile, and then the Poland tract begins at the head of the Bay. The Poland tract covers 320 acres. The western boundary line of the Polland tract would be almost a continuation of a line running through Seward about the middle, and then it runs [63] up in a square. The eastern side strikes the Bay again about a half a mile, I should judge, from the western side. It goes right down to the head of the Bay, and it has about a half a mile frontage on the head of the Bay.

Q. You prepared for me a rough sketch on yesterday, and I see here you have 'Seward' marked on this plat; by that you mean the present townsite of Seward?

A. Yes, sir; that is the present townsite of Seward.

Q. And the Poland tract is the tract you last referred to? A. Yes, sir.

Q. What is meant by these two words 'Reserved tract'?

(Testimony of J. E. Ballaine.)

A. That is a tract of 223 acres granted by Act of Congress in 1906, directly to the Alaska Central Railway Company on the payment of $1.25 an acre.

Q. Did that reserved tract pass to the United States Government on the transfer of the property holdings of the Alaska Northern?

A. Passed to the Government?

Q. Yes, sir.

A. No; it was reserved out by this committee which Mr. Boland represents.

Q. It was transferred to the United States Government in 1915, and it was reserved from that transfer, and held by this committee?

A. No; that is practically so, but the exact situation is this: It belonged to the Alaska Central originally, and when the Alaska Central was sold at foreclosure sale, it was bid in by F. G. Jemmett, trustee, that is all the assets of the Alaska Central; then, F. G. Jemmett, trustee representing some people whom Mr. Boland represents, the twelve banks in Canada which took over the Sovereign Bank of Canada, Mr. Jemmett, Trustee, in turn, conveyed to the Alaska Northern by deed of record in Alaska, all the assets which he bid in, except this reserved tract, [64] That exception is stated by deed of transfer.

Q. So it never went to the Alaska Northern, but still remained with this syndicate in Canada?

A. Yes, sir, it is still in that syndicate.

Q. I show you this sketch. Resurrection Bay is marked there; that indicates roughly the bay?

A. Yes, sir, the upper end of the bay.

(Testimony of J. E. Ballaine.)

Q. Where you say 'Seward,' that represents roughly the townsite which you are interested in?

A. It represents 160 acres, on the incorporated limits of Seward, extending up to the—

Q. Extending up to the middle of the Poland tract?

A. Yes, sir.

Q. But that represents your townsite?

A. That represents the original 160 acres which we platted, the incorporated limits run 500 feet west of the west line of our tract, and due northerly to the middle of the Poland tract. I have made the dotted lines there.

Q. I wish you would make with dotted lines the extent of it.

A. That is approximately the incorporated limits of the town. (Marking.)

Q. I have marked here the words 'corporate limits,' so as to indicate that?

A. Yes, sir. To be exact, the line of the corporation runs 500 feet west of the west line of Seward, and continues due northerly to the middle of the line of the Poland homestead tract, and then westerly to the extreme easterly side of the reserved tract.

Q. You mean the easterly to the extreme?

A. Yes, sir, easterly to the extreme. I think it is the extreme easterly. It is very close to that.

Mr. GRAVES.—For the purpose of reference, I would like to introduce that plat for what it is worth.

Mr. BRONSON.—I would like to ask the witness one more question. [65]

(Testimony of J. E. Ballaine.)

Recross-examination.

(By Mr. BRONSON.)

Q. You are not pretending, Mr. Ballaine, that this is accurate with reference to distance, or anything like that?

A. That is just a rough pencil sketch, approximately so.

Q. For instance, what you have Seward, 160; you mean that is the townsite?

A. That is our original townsite, 160.

Q. There are some tracts intervening between that and this Poland tract, aren't there?

A. Yes, sir; there are 60 acres belonging to the Government, and 40 acres belonging to what was known originally as the Laubner homestead.

Q. That would make a little difference in this plat?

A. Of course, that is only a pencil sketch.

Q. Isn't there a third intervening piece in there?

A. No; the Government platted a little strip called 'Bay View strip,' I think, but that runs up on the side of the Government 60 acres, and on the west side of the Laubner tract, and then upon the west side,—well, it just joins the southwest corner of the Poland tract.

Q. There is the terminal tract, the Laubner tract, and the United States Government tract, and the Lake View, or Bay View tract, are reserved?

A. The terminal tract, and the Government tract are one and the same.

Q. Are you sure about that?

(Testimony of J. E. Ballaine.)

A. The official name of the Government tract is the Terminal tract.

Q. Take a look at this blue-print and see if that does not show.

A. This is the Government tract.

Q. There are three tracts intervening?

A. That is reserved. [66]

Q. There are three tracts of land.

A. There is no location on it. I could not get at the distance between those two.

Q. What is it, about three miles?

A. Oh, Lord, no, no. I can give you the exact distance in feet, if you will give me that map.

Q. This one here? A. Yes, sir.

Q. (Handing witness map.)

A. (Witness continuing.) Well, it is about twenty-two hundred feet from the northwest corner of our property to the southwest corner of this property here.

Q. Where is the main business district?

A. Right here below Jefferson Street.

Q. You could not go upon those two properties, from one to the other, in any such distance?

A. No. There is an automobile road built by the Government across some flats. There is tide-flats in that little lagoon.

Q. But there wasn't at that time?

A. Yes, sir, there was a road— At what time?

Q. Was there any automobile road? A. When?

Q. At that time, in 1915.

A. Oh, yes; the Government built the road there—

(Testimony of J. E. Ballaine.)

Q. When did the Government start in to do it? I am talking about 1915.

A. That road was built about 1908.

Q. Across the tide-flats?

A. Oh, yes, sir, it has been built clear up to the head of Resurrection Valley, about seven miles.

Q. How long do you suppose it is from the business district of Seward out to the Poland tract? [67]

A. By the railroad ties?

Q. I mean by the way you go other than railroad?

A. About a mile. But the Poland tract, the whole southern side of the Poland tract, it abuts squarely on the head of the bay.

Redirect Examination.

(By Mr. GRAVES.)

Mr. GRAVES.—I offer this in evidence.

Mr. BRONSON.—I have no particular objection. It is not accurate. The witness admits that. There is a great deal of the distance between the two tracts which he does not indicate on that plat.

Mr. GRAVES.—The witness has given the distances.

The COURT.—It may be admitted."

This exhibit was marked Plaintiff's Exhibit 4, and as such is attached and made a part of this bill.

Recross-examination.

The witness said his title was involved by the Alaska Northern suit until November, 1916, because there was a right of appeal and West had announced that he would exercise it. Here the examination of

(Testimony of J. E. Ballaine.)
the witness was concluded and the following motion made by defendant's counsel:

"Mr. BRONSON.—I move to strike out the evidence with reference to what Mr. Patrick said as not having been connected up with the defendants in any way. It was admittd by the Court on the supposition that it might be connected up.

Mr. GRAVES.—It is useful for two purposes. The testimony of Mr. Boland that Mr. Patrick was representing him. It is also the testimony of Mr. Boland that Mr. Patrick is the gentleman who gave him advice, which he followed in good faith, and it goes to the good faith of the advice given by Mr. Patrick as to the [68] bringing of this suit. He says that he brought it upon the advice of Mr. Patrick. Mr. Boland had the same information that Mr. Patrick had regarding this, which had already been given to him by Mr. Haight, and Mr. Patrick was there at the time of this transaction, according to Mr. Boland's own statement. He was representing this corporation, and representing this committee.

Mr. BRONSON.—I don't think Mr. Patrick's motive has anything to do with it. If I can come to a lawyer and ask his advice with reference to a state of facts, and submit the facts to him which relate to a transaction of a case against another party, and I relate the facts fully to him, and he tells me that I have a cause of action, or that I have a reason for the prosecution of the other case, the fact that he might have in the back of his head some spirit of re-

(Testimony of J. E. Ballaine.)

venge towards this other party, has nothing to do with me.

The COURT.—The motion is denied.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed."

Additional Testimony of James A. Haight.

Mr. HAIGHT, being recalled, said that Boland was mistaken when he said that he (Haight) had told Boland at Toronto that Ballaine had told him that he had paid $4,000 for the property because he had never discussed the matter with Ballaine until August, 1915, after which time he wrote to Boland and secured his or his associate's permission to accept a retainer from Ballaine and defend him in the suit.

Motion for Directed Verdict.

At this point plaintiff rested and counsel for defendant challenged the sufficiency of the evidence to support a verdict and further moved the Court to direct the jury to return a verdict for [69] the defendant. After argument the motion was by the Court denied, an exception to the ruling being asked, and by the Court allowed.

Excerpts from Deposition of George H. Patrick, for Defendants.

The depositions of George H. Patrick and T. C. West were published, the same having been taken on stipulation and order of the Court. To the deposition of Patrick were attached a number of letters as

exhibits, which were duly admitted by the Court and read to the jury following the reading of the deposition. The entire deposition and exhibits therein referred to are attached to and made a part of this bill, but the material parts of the deposition itself are here set out for the convenience of Court and counsel.

Mr. Patrick testified:

That he had practiced law about fifty years, the last twenty in Washington, D. C.; that he was acquainted with the parties in this cause and with the parties in the Alaska Northern suit. That he had known Colonel Swanitz, chief engineer of the Alaska Central and Alaska Northern Railways. He was asked to state in his own way his connection with and his acquaintance with the facts and witnesses in the Alaska Northern suit against the Ballaines and what advice if any he gave to the defendants in this action, particularly W. J. Boland and W. E. Stavert with reference to bringing the former action. To which question he replied:

"A. I was the attorney,—called the general attorney of the Alaska Northern Railway Company from January, 1910, the date of its organization, until that railway was sold to the Government of the United States. I was located in Washington all the time in correspondence with all the officials of the company wherever they were located, constantly receiving inquiries for advice and instructions, which I gave, as well as attending to whatever matters the company might have in Washington. I knew Colonel Swanitz very well, received a great many communications from him, and my first information of any [70]

ground for a suit by the company came from him in a letter written by him to United States Senator Chamberlain, bearing date June 2, 1913, which I received a few days later from Colonel Swanitz. Reference was made therein to the townsite, and I at once inquired of him concerning it. I received a considerable number of letters from him bearing on the subject and I wrote a number to him, and I had several conversations with him about the matter here in Washington."

The witness produced copy of the Swanitz letter to Chamberlain sent to him by Swanitz and the same was attached to the deposition and with the same as aforesaid is attached to and made a part of this bill.

The witness also produced from his files, and identified certain letters, in Swanitz's handwriting, which were attached as exhibits to the deposition as follows:

Letter from Swanitz to witness dated July 3, 1913, marked Exhibit 2.

Letter from Swanitz to witness dated July 30, 1913, marked Exhibit 3.

Letter from Swanitz to witness dated July 30, 1913, marked Exhibit 4.

Letter from Swanitz to witness dated Aug. 17, 1913, marked Exhibit 5.

Letter from Swanitz to witness dated Jan. 15, 1914, marked Exhibit 6.

Letter from Swanitz to witness dated Feb. 11, 1914, marked Exhibit 7.

Letter from Swanitz to witness dated Feb. 14, 1914, marked Exhibit 8.

Letter from Swanitz to witness dated Sept. 10, 1914, marked Exhibit 9.

Letter from Swanitz to witness dated Nov. 3, 1914, marked Exhibit 10.

Witness also produced a document purporting to be a copy of a letter from E. R. Keeler to John E. Ballaine, dated September 23, 1904, which was sent to him attached to Colonel Swanitz's letter of February 11, 1914, Exhibit 7.

Witness was asked what advice he gave to Boland, Stavert and Jemmett, or either of them.

"A. I advised them that in my judgment the facts communicated to me showed that the Seward Townsite had been purchased with money belonging to the Alaska Central Railway Company, or the construction company [71] which was the same thing; that Ballaine constituted himself a trustee holding for the company and that the title and possession of the townsite could and should be recovered by the Railway Company and be made a part of its assets. I also advised them, at least I advised Messrs. Stavert and Boland—I am not sure as to Mr. Jemmett—although I believe I did tell him the same thing—that in case action should not be brought by them they might be held liable for not having faithfully collected and turned into the treasury of the company one of its most valuable assets.

The witness further testified that he had been told that Boland, Stavert and Jemmett were trustees for the bondholders of the Alaska Central, and had seen the receipts given for the bonds deposited with them and knew from the bondholders and the conveyances

that they had transferred the assets of the Alaska Central to the Alaska Northern, which was organized to purchase them and operate the road, which it did. At the time witness first heard of the townsite claim, W. E. Stavert was president and F. G. Jemmett was treasurer of the Alaska Northern, these men being two of the named defendants on this action.

Witness knew the Shedds of Chicago, who were bondholders, but did not remember discussing the ownership of the townsite with them though he saw some letters of one of the Shedds in the hands of Swanitz who told him that the Shedds "would almost certainly, and they expected to proceed against the trustees to hold them for any deficiency in the distribution of the proceeds for the railroad if it should appear that suit ought to have been brought or that suit might have been brought with a reasonable chance of success."

"Q. Did he make any statement as to what their claim was so far as the townsite of Seward was concerned?"

"A. Yes; that their claim was that as part owners of the Alaska Northern Railway Company, the right, title and interest that that company had in Seward was something to which they might and [72] should look for the satisfaction of their bonds."

Witness said he knew of the firm of Bicknell, Bain, Macdonnell & Gordon, solicitors at Toronto, Canada, and had had correspondence with them, that he knew from various sources that they represented certain

banks in Canada which had taken over the assets of the Sovereign Bank of Canada, which was the very large majority owner of the Alaska Central securities and the road after sale.

The witness said the said firm had inquired of him about the townsite matter and produced carbon copies of letters written to Bicknell, Bain, etc., on September 12, 15, and 16, which were attached to the deposition as Exhibits 11, 12 and 13. To the letter of September 16, that is, Exhibit 13, was attached copies of the Swanitz letters to Patrick.

The witness also produced from his files a carbon copy of a letter written to the defendant Stavert which was annexed to the deposition as Exhibit 14 and with all of the foregoing exhibits is made a part of this bill.

The witness further testified as follows:

"Q. Did you have any doubt about the statements contained in Colonel Swanitz's letters and in his interviews with you, I mean as to the correctness or reliability of what he stated.

A. None whatever. Everything that he stated to me that I had an opportunity to investigate was amply confirmed.

Q. As a result of the conversations and the correspondence which you had an opportunity to examine, what was your opinion as to the result of an action that might be brought to recover that townsite?

A. It was my opinion that the action must certainly result in the recovery of the townsite and I so advised Mr. Stavert, the president, Mr. Boland, Mr. Bicknell's firm, Mr. Jemmett and also Mr. G. T.

Clarkson who represented the Canadian Banks, for whom Bicknell, Bain, Macdonnell & Gordon appeared as counsel."

The witness further testified: [73]

"I never had any doubt whatever of the fact that Colonel Swanitz, by his own evidence and the documents he had and asserted his ability to get and the evidence of other witnesses he repeated to me would establish clearly the right of the railroad company to this townsite. Colonel Swanitz was extremely earnest in his assertions of what proof could be made to sustain this contention. He brought Mr. Thomas C. West of San Francisco here to consult with me about the case, to go over the facts and the law bearing upon them with him, and he was present at Mr. West's and my interviews confirming whenever I quoted as coming from him.

Q. You also had rather strong views as to the duties and obligations of the trustees and as to the responsibility that would be imposed upon them in case action was not commenced?

A. I had; I had good reason, as I thought, to fear that action would almost certainly be taken against them if they did not bring the suit, and I advised Mr. Stavert and Mr. Boland, I know, that I thought it might be necessary for their own self-protection to bring the suit, even if they failed to maintain it, under all the circumstances.

Q. But you never had any doubt of the result, if the evidence could have been obtained according to Colonel Swanitz's statements? A. I had not."

Excerpts from Deposition of T. C. West, for Defendants.

Defendant's counsel read to the jury the deposition of T. C. West, taken on stipulation before James Mason, a notary public, at San Francisco. This entire deposition is attached to and made a part of this bill, but for the convenience of Court and counsel its salient parts are here set out as follows:

Mr. West testified, that he resided at 1204 Walnut St., Alameda, California, and that his law office was at 1170 Phelan Building, San Francisco; that he had practiced law twenty-six years [74] in all, and about seventeen in California; that he was acquainted with all the parties to this action except Mr. Stavert and that he was one of the attorneys for the plaintiff in the Alaska Northern suit against Ballaine. Witness was acquainted with Colonel Swanitz.

"Q. Mr. West, will you go on and state in your own way, your connection with and your acquaintance with the facts and the witnesses in that matter prior to the institution of the action, and what advice and counsel you gave to the defendants in this action and particularly to Mr. W. J. Boland with reference to the bringing of the former action?

A. I had known Colonel Swanitz for probably a couple of years before the action was commenced. Mr. Boland, I had known personally for quite a long time before the action, and I believe I formerly knew him a great many years ago in Toronto. Mr. Jemmett, I had met once in Washington. The matter of bringing the action against the Ballaines was dis-

cussed very fully by Mr. Boland and myself and Colonel Swanitz, and I also consulted in this action with Mr. Patrick, an attorney in Washington, D. C. All the data necessary for the action was gathered during a period covering about a year, and I constantly urged the bringing of the action, but nothing was definitely settled as to its actual commencement until Mr. Boland came to San Francisco from Toronto to consult with me. Mr. Boland and I thereupon prepared the complaint and cabled it to Valdez, Alaska, to my agents there, Messrs. Donohoe & Dimond. The reason for cabling was, that there was some question as to whether or not the Statute of Limitation would run against the cause of action in case the suit was not started immediately after Mr. Boland arrived here.

Q. Will you state who Colonel Swanitz was with reference to any prior matters or business of the Alaska Northern or the Alaska Central Railroad? [75]

A. Colonel Swanitz had formerly been the chief engineer for the Alaska Central Railway and was interested also in the Tanana Construction Company and in the Tanana Railway Construction Company. I understood from him that he had previously had access to the books, papers and documents of the Alaska Central and the Construction Company mentioned, and from my frequent consultations with him believed and still believe that he knew all of the facts upon which we relied for the success of the action. His familiarity with it, correspondence and papers which I afterwards had occasion to examine, con-

vinced me of his thorough knowledge of the matters that would arise in the course of the trial.

Q. Mr. West, Colonel Swanitz was afterwards a witness for the plaintiff in that action, was he not?

A. Yes.

Q. State whether or not his evidence as given upon the witness stand in the case agreed with substantially what he had told you his evidence would be in your interviews with him prior to bringing the action? A. No, it did not.

Q. Just state in your own way, if you will, whether the discrepancy was of a serious character or would produce good or bad effect upon the plaintiff's case in that case?

A. Yes, the difference in the story told on the witness stand and that told to Mr. Boland in my presence and to me personally on many occasions, was very great and in one respect very vital to the interests of the plaintiff. As an illustration, both Mr. Boland, Mr. Patrick and myself were always informed by Colonel Swanitz that the directors and officers, including himself, of the Alaska Central Railway Company and of the Construction Company mentioned, had always understood, and it was a matter of [76] general knowledge to them that the Ballaines held the townsite of Seward for and on behalf of the Alaska Central Railway.

Q. Was the Alaska Central Railway Company the predecessor in interest of the Alaska Northern Railway Company, the plaintiff in the former action?

A. Yes.

Q. Were Ballaines or either of them members of

the Directorate of the Alaska Central Railway Company?

A. John E. Ballaine was and I believe Frank Ballaine was also.

Q. Did you advise Mr. Boland whether or not in your opinion the Alaska Northern Railway Company had a good cause of action against the defendants Ballaine in that case to the recovery of the townsite which was the subject of the action subsequently brought?

A. Yes, I so advised them and still believe that action ought to have prevailed.

Q. Did you advise them, Mr. West, and do you know whether or not Mr. Patrick advised them, or if you do not know as to him, did you advise them yourself as to what was the duty of Mr. Boland, Mr. Stavert and Mr. Jemmett as trustees with reference to bringing such suit?

A. Yes, I advised Mr. Boland that it was his duty to bring the action in order to protect those for whom he and Jemmett and Stavert were trustees, and I understood from Mr. Patrick that he also had advised them to the same effect.

Q. Mr. Patrick is a practicing attorney at law in Washington, D. C., is he not?

A. Yes; of a great many years' experience, and Mr. Patrick was thoroughly familiar with all of the details of the Alaska Central and Alaska Northern, in fact, more familiar with them than any of us. [77]

Q. What conversation did you have with Colonel Swanitz at any time prior to the bringing of this

former action with reference to Mr. Ballaine's relationship to the townsite?

A. I had a great many conversations with Colonel Swanitz, and in all of them where the matter was discussed, he informed me that John E. Ballaine never claimed to own the townsite personally, but that he always acknowledged that he was holding it for and on behalf of the Alaska Central Railway Company, and the first time I ever heard Colonel Swanitz say anything to the contrary was when interrogated on that subject at the trial of the action.

Q. And what was his evidence then?

A. When he stated that John E. Ballaine always claimed to own the townsite, which came to me as a complete surprise."

Testimony of W. J. Boland, in His Own Behalf.

Mr. Boland testified as follows:

That Mr. Jemmett, Mr. Stavert and himself were trustees representing the former bondholders of the Alaska Central Railroad. As such they foreclosed the road, bid in the assets for the bondholders, reorganized as the Alaska Northern and finally sold out to the United States Government, reserving the Poland tract and the rights to the townsite of Seward. Colonel Swanitz was the chief engineer of both roads. Mr. Dowdell was a Chicago contractor and had at one time been a director of the Alaska Central or one of its subsidiary construction companies.

"Q. When did you have this conversation with Mr. Dowdell anyway with reference to this townsite?

(Testimony of W. J. Boland.)

A. I don't remember the exact date. It was before this action was commenced. I saw Mr. Dowdell in the presence of Mr. Swanitz in the city of Chicago. I think it was at the Congress Hotel that Mr. Dowdell told me that Mr. Ballaine had at all times *had* admitted to him that he held the townsite of Seward for the Alaska [78] Central Railroad, and that he was prepared to swear to it.

Q. As a matter of fact, at the trial of the case did he swear to it?

A. He was examined on commission in Chicago. He was not present at the trial, but he swore to it, because I read the evidence."

The witness was asked what Colonel Swanitz had told him and replied:

"A. Mr. Swanitz told me that Mr. Keeler had made this $4,000 payment in connection with the townsite of Seward at a time when he was in charge up there, and that the reason that the payment was made was because the townsite of Seward belonged to the railroad company, and that Mr. Ballaine had always admitted it belonged to the railway company. He also showed me the prospectus—

Mr. GRAVES.—What date was this?

A. I don't remember the date. It was on several occasions. It was once in New York, once in Mr. Patrick's office, once in the presence of Mr. Patrick, and Mr. West and myself in Chicago, and once in the presence of Mr. West and Mr. Dowdell and myself in Chicago. I don't remember the dates.

Q. Go ahead.

(Testimony of W. J. Boland.)

A. He also showed me a prospectus in which the statement was made that the townsite of Seward—I don't know whether it mentioned, or not, the terminus, and the other townsites would be opened up for the benefit of and be the property of the railway companies.

Q. This was the prospectus printed, a folder, or something of that kind.

A. It was a printed folder issued by the officers of the defendant construction company, or the railway company, which Mr. Ballaine afterwards admitted by his evidence that he caused to be issued.

Mr. GRAVES.—Just answer the question.

Q. (Mr. BRONSON.) Did Mr. Ballaine admit that he caused that prospectus to be issued?

Mr. GRAVES.—I object to that. [79]

The COURT.—Unless it was this before the trial of the suit the objection will be sustained.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

Q. When did Mr. Ballaine make this statement?

A. About three years ago now, when we were taking evidence from the bank books in Seattle, and in the cross-examination Mr. Ballaine admitted it.

Q. But it was after the suit had been brought?

A. After action had been commenced, yes.

The COURT.—The objection is sustained. Exception allowed."

Continuing as to Colonel Swanitz, the witness said:

"A. Colonel Swanitz said that he had books, papers and documents that he had gone over with

(Testimony of W. J. Boland.)

Mr. West, and that there wasn't any question but the townsite was the property of the Alaska Central Railroad; in addition to that, Mr. T. C. Hanson, who himself was a lawyer, a bondholder, told me that he had gone over the facts in connection with it, and that he was satisfied that the townsite was the property of the Railroad Company, and if we didn't take action, that he would take action when the transaction was completed against the trustees for not proceeding."

The witness explained that Hanson was a lawyer and banker in Milwaukee and continuing as follows:

"A. Marion Butler, of Butler and Vaile of Washington, claiming to represent minority bondholders—I have forgotten their names—told me that he had investigated the facts, and that he considered Mr. Swanitz's statement, and that the trustees were bound to proceed, because the townsite belonged to the railroad company, and if they didn't proceed he would advise his client to take action against us. Then E. A. Shedd, of Shedd Bros. in Chicago, told me in the presence of his brother and Mr. Swanitz, that he [80] always understood the townsite was the property of the railway company, and that that was the reason why it was included in the loan, as security for the loan which he made, and if we didn't take any action he certainly would take action against the trustees. Subsequently, Mr. Mathews, Jr., partner of Mayer, Mayer, Atherton & Platt of Chicago, one of Chicago's principal law firms, told me, in discussing the matter, representing those same people, that he had investigated the facts on behalf of Shedd Bros.

(Testimony of W. J. Boland.)

and others, whom he represented, that he was satisfied that the townsite was the property of the Railway Company, and that Mr. Meyer was also satisfied, and if we didn't proceed, that we would have to answer for it later on. All this was before the action.

Q. Did you consider mentioning Mr. Bicknell, or not?

A. James Bicknell was general counsel of the Bankers Association. I had Mr. Patrick put all the facts before him, all the correspondence, and had Mr. Bicknell write him. I also told Mr. Bicknell what I have told you here of my investigation, what had been told me by Mr. Swanitz, what had been told me by Mr. West, and what had been told me by Mr. Patrick, who also told me that he had investigated all the facts, and that we could not fail to succeed, and Mr. Bicknell told me that in his opinion the railroad company was the owner of the property, at least, the townsite was the property of the railway company, and that he intended to write an opinion to the banks interested, and to tell them that action ought to be taken in the matter at once. He represented about 78 per cent of the bond holders. Mr. Bicknell told me this opinion on Friday, and on Monday I called his office up, and they said he was sick with a cold, and he was taken with pneumonia, and was buried the following Monday. He never was back in his office. Then subsequently, D. E. Thompson of Thompson, Dowdell & Johnson, of 85 Bay Street, Toronto, a man of many [81] years practice, came into it, representing the same interest that Mr. Bick-

(Testimony of W. J. Boland.)

nell represented. He went over the correspondence, had a chance to discuss it with Mr. Patrick when he was in Toronto, in December, 1914. I told him all the facts as I knew them, and he gave it to me as his opinion that undoubtedly we must succeed, and that the townsite was the property of the railway company. Further than that, when we were negotiating with the United States Government, J. P. Cotton, of Spooner & Cotton of 14 Wall Street, he discussed the facts, and went into it, and I told him what Mr. Christenson had represented to Mr. Swanitz, and had been passed on to him, and told him the other facts, and he said that undoubtedly that townsite was the property of the Railway Company.

Q. Did you, when this matter first came to your attention, immediately rush off into an action against Mr. Ballaine?

A. I certainly did not. I never heard of the claim in connection with the townsite, or knew anything about the facts, until sometime in the spring or summer of 1914, when I was in Washington, when Mr. Patrick first told them to me. They came to me as a revelation. I had never heard of them at all. I did everything that I possibly could do in order to get at all the facts. I interviewed Mr. Keeler—I don't remember whether it was before, or after the lawsuit. But I sent him the check and asked him to come to New York from Connecticut, where he was. I met him in the Waldorf-Astoria, where I was stopping. I showed Mr. Keeler a copy of the letter which I had been able to get from Colonel Swanitz, and he told me

(Testimony of W. J. Boland.)

then that he paid this money because he understood that the townsite was the property of the Alaska Central Railway, and that was the reason for paying it. Afterwards, when he was called as a witness, before he gave his evidence, he came up to my hotel— [82]

Mr. GRAVES.—I object to that. He has been over that.

WITNESS.—I want to explain what he said.

The COURT.—If it was before the suit was brought, all right. What he testified to afterwards is not.

WITNESS.—I want to explain that his evidence was in contradiction of his statement, and I wanted to state why—

The COURT.—The objection is sustained.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed.

Q. What was your opinion as to the merits of the case on the advice which you got from counsel?

A. I gave it as my opinion on the case that undoubtedly this property was the property of the Railway Company, and I had a similar case in my office at the time, which had just been finished, at the privy council, the last court in our country, which had been decided in my favor, on my view, that the principle laid down, that a trustee, or director, acting for a company, could not acquire valuable property which was brought into existence by the company for his own use and benefit; that he had to account for it.

Mr. GRAVES.—If you are telling that to the jury, the Court will instruct them as to the law. We doubt

(Testimony of W. J. Boland.)

that that is the law of the United States.

Q. (Mr. BRONSON.) I ask whether or not, you thought you had a good case against Mr. Ballaine?

A. Undoubtedly.

Mr. GRAVES.—No objection to his answering that.

Q. (Mr. BRONSON.) Did you have any malice, or spite, or ill will against Mr. Ballaine?

A. Absolutely none.

Q. Have you ever had? A. None. [83]

Cross-examination.

Witness talked with Hanson in the fall of 1914. The witness could not remember whether he saw all the letters written by Swanitz to Patrick, admitted as exhibits to Patrick's deposition, or not, but he did see the final letter from Patrick to Mr. Stavert. He thought Hanson's opinion based on information he had himself collected. He did not ask him to give evidence at the trial because he did not think it necessary.

He talked with Mr. Butler in the spring of 1915 before the Alaska Northern suit was commenced. He did not call upon him to furnish evidence. The witness talked with Mr. Shedd several times but thinks he did not know that Keeler represented the Shedds until after evidence in the suit was taken.

"Q. You knew that Mr. Shedd was furnishing the money up there at the time this money was paid to Mrs. Lowell; you knew that, didn't you?

A. I must have known it. I can't recall now.

Q. You investigated this case, didn't you?

(Testimony of W. J. Boland.)

A. Yes, sir.

Q. Did you rely on mere rumor, or did you look for facts? A. I looked for facts.

Q. Did you get facts? A. I thought I did.

Q. Did you produce any at the trial?

A. I thought so.

Q. The Court found you did not.

A. Well, the unfortunate part about it was that Mr. Swanitz, according to Mr. Shedd—

Q. I don't care for that.

A. Mr. Swanitz came to me—

Q. I didn't ask about Mr. Swanitz. [84]

A. If you will let me, I will tell the story.

The COURT.—Let him answer .

Mr. BRONSON.—We are going to insist on the same thing you insisted on yesterday, and that is, that he be allowed to finish his answer.

Mr. GRAVES.—He has stated that two or three times. If you wanted to say something against Mr. Swanitz, Mr. Swanitz is dead.

A. I know that, and that is the reason why I hesitate to talk.

Q. I didn't notice your hesitating before.

A. I did. Mr. Swanitz, in his evidence in Seward went back on all the statements that he made in the presence of Mr. Dowdell and myself, and in the presence of Mr. West and myself, and in the presence of Mr. Patrick and myself. I have no reason for thinking or believing that the statements Mr. Swanitz made to me prior to that trial, in the presence of those various people, were not absolutely true.

(Testimony of W. J. Boland.)

Q. As an attorney, of course you differentiate yourself as a witness. You made this statement awhile ago. What is the object of repeating it? When you say that you hesitate to say anything against Mr. Swanitz?

A. I am not saying anything against him.

Q. You made this statement twice. Let it rest. When I ask you a question do not refer to that again. Who is Mr. Mathews?"

The witness said that Mr. Mathews was the junior partner of Mayer, Mayer, Austin and Platt and that he discussed the matter with him in Chicago within three or four months before the action began. Mathews said he had investigated what the Shedds had told him and was satisfied. Mathews did not furnish the witness any witnesses or documents.

"Q. You knew then that he was merely venturing an opinion?

A. Yes, sir, I suppose it was an opinion. [85]

Q. And as a business man, and as a lawyer, do you want to say to this jury that you acted upon the opinion of a man who knew nothing about the case?

A. But he did.

Q. He knew what?

A. He was representing certain bondholders, and told me that he had investigated the facts, and I took his word for it.

Q. Didn't you feel interested to know what facts he had in his possession?

A. I knew enough facts of my own, that if they

(Testimony of W. J. Boland.)

were substantiated on the trial, there could have been only one result.

Q. Then you were not controlled in your actions by anything that Mr. Mathews said?

A. It all helped.

Q. Did it help then, or when did it help?

A. Here were independent men representing various bondholders for whom they were acting, giving an opinion on it.

Q. Mr. Bicknell received this letter written in December, 1914, by Mr. Patrick, didn't he?

A. I don't know that.

Q. Well, it was after that that he expressed an opinion to you?

A. No, sir, Mr. Bicknell did not. Mr. Bicknell was dead in September of 1914.

Q. Mr. Bicknell was dead in September, 1914?

A. Yes, sir, he died early in September, about the middle of September, 1914.

Q. When did you talk with him last about it?

A. I don't remember when he died, but it was a day or so before he died that he and I discussed the matter. He told me he was going to write an opinion on it. He took sick on Saturday or Sunday, and never come back. [86]

Q. Who is Mr. Thompson?

A. Mr. Thompson is supposed to be one of Toronto's ablest attorneys; E. E. Thompson, or Thompson, Tilly & Johnson.

Q. Did Mr. Thompson furnish you with any evidence? A. No.

(Testimony of W. J. Boland.)

Q. Who is Mr. Cotton?

A. Mr. Cotton represented the United States Government at the taking over of this railroad.

Q. And he expressed to you an opinion?

A. We discussed the facts with him, because we were trying to get the Government to buy the land as well, and they would not do it, because they only wanted railroads, they said.

Q. To get them to buy the land as well?

A. Yes, sir.

Q. And Mr. Cotton expressed the view that it belonged to the railroad company?

A. We told him the facts. I told him the facts exactly as they were presented to me.

Q. As a matter of fact, what Mr. Cotton said to you was based upon what you said to him, was it not?

A. What I have told you here to-day, what Mr. Swanitz said, and what others said.

Q. What Mr. Patrick said.

A. What Mr. Patrick said, and the documents with the transaction, what Mr. Dowdell said about Mr. Ballaine's admissions in connection with the townsite.

Q. Were you in Washington City at the time of the hearing before the Senate Committee, and thereafter?

A. No, sir, I was not; I certainly was not. What time do you mean? I have been at some of the hearings.

Q. In 1913, before the Senate Committee?

(Testimony of W. J. Boland.)

Mr. BRONSON.—Are you taking up cross-examination now? [87]

Mr. GRAVES.—I am coming back to it.

Q. (Mr. GRAVES.) Were you there in 1913?

A. I don't think so; I don't think I was there that winter at all. I think Mr. Ballaine said that Mr. Jemmett and Mr. Patrick was there. I was not there; I am sure of it. I may have been there in July, 1913, Mr. Graves, but that was after the hearing; in fact, I think I was, because I recall something that happened.

Mr. GRAVES.—That is all.

WITNESS.—He was asking me about being in Washington in 1913; I wanted to correct that.

Mr. GRAVES.—If you don't remember being at the Senate Committee hearing, the hearing of the Senate Committee.

A. I was not at the Senate Committee, but I was in Washington in July, 1913. I want to say a word on this question of malice to show that there wasn't any malice. Mr. Ballaine came to me in 1913. At that time, I thought he owned the townsite. I had no information to the contrary. He wanted me to get our people to loan him $25,000 on the security to help along on the work that he was doing in Alaska. I went back and recommended to them to loan him the money.

Q. That was in 1913?

A. That was in 1913. I had no knowledge then of the facts in connection with the townsite.

Mr. GRAVES.—That is all.

Mr. BRONSON.—The defense rests.

The COURT.—Has the plaintiff any further testimony?

Mr. GRAVES.—The plaintiff rests.

Renewal of Motion for Directed Verdict.

Mr. BRONSON.—If your Honor please, I wish at this time to renew [88] the motion I made to instruct the jury to render a verdict for the defendant in this case.

The COURT.—The motion is denied.

Mr. BRONSON.—Note an exception.

The COURT.—Exception allowed."

Whereupon counsel argued the cause and the Court duly instructed the jury. No exceptions were taken.

Recital Relative to Verdict.

Thereupon the jury having received the charge of the Court retired to consider their verdict and shortly thereafter on, to wit, the 19th of September, 1918, returned a verdict in favor of the plaintiff, J. E. Ballaine, and against the defendant, W. J. Boland for the sum of $30,000.00, and thereafter on, to wit, the 27th day of November, 1918, judgment was entered in accordance therewith and on January 6, 1919, in accordance with the rules of the above-entitled court, a petition for a new trial was duly filed, which was by order of the Court denied on January 21, 1919—such order providing that the defendant should have thirty days from the date thereof to prepare and file his bill of exceptions.

And now, in furtherance of justice, and that right may be done, the defendant presents the foregoing, with the attached and before mentioned exhibits and depositions as his bill of exceptions and prays that the same may be settled, allowed, signed and certified by the trial judge.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant.

Received a copy of the foregoing proposed bill of exceptions with notice that the same would be lodged with the clerk of the above-entitled court this 20th day of February, 1919.

LYONS & ORTON,
Of Counsel for Plaintiff. [89]

[Indorsed]: Defendant's Proposed Bill of Exceptions. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [90]

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

This matter coming on regularly before me on the 10th day of July, 1919, the date designated by me for settling the bill of exceptions in this cause, and it appearing that the defendant within the time fixed by order entered January 21, 1919, had on February 20, 1919, lodged with the clerk of this court his proposed bill of exceptions, and that such amendments as have been thought necessary have been made by agreement of counsel;

NOW, THEREFORE, counsel for both parties being present and agreeing, approving and consenting; it is by the Court and the Judge of said court presiding at the trial of said cause

ORDERED and CERTIFIED that that certain bill of exceptions lodged with the clerk as aforesaid on the said 20th day of February, 1919, consisting of sixty-two typewritten pages, together with Plaintiff's Exhibits Nos. 1, 2, 3 and 4, and the original depositions of T. C. West and George H. Patrick, together with the exhibits attached to them, all of which are attached and made a part of the said bill, includes all of the material facts and evidence herein, and is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein and the same being so settled and certified it is hereby ordered to [91] *to* be filed herein by the clerk.

EDWARD E. CUSHMAN,
Judge.

Received a copy of the foregoing order this 10th day of July, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for Plaintiff.

[Indorsed]: Order Settling Bill of Exceptions. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [92]

[Title of Court and Cause.]

Assignments of Error.

Now comes the defendant W. J. Boland, by his attorneys, Bronson, Robinson & Jones, and says: That the judgment entered in the above cause on the 27th day of November, 1918, is erroneous and unjust and that the Court erred in entering its order on or about Jan. 22, 1919, denying the defendant a new trial, for the following reasons:

FIRST. The evidence was insufficient to support or justify the verdict returned in said cause on the 19th day of September, 1918, and upon which verdict the judgment is based; the said evidence being insufficient in that it did not justify a finding of:

1. Want of probable cause in instituting and maintaining the original suit.

2. Malice on the part of the plaintiff in instituting the original suit.

3. Legal damage to the plaintiff.

SECOND. The Court erred in refusing to grant defendant's challenge to the sufficiency of the evidence, and his motion to direct a verdict at the close of plaintiff's evidence.

THIRD. The Court erred in refusing to grant a motion for a directed verdict in favor of the defendant at the close of [93] all the evidence for the reasons given in the First Assignment and for the additional reason that the defendant had then affirmatively established the existence of probable cause by proving without rebuttal or contradiction

that the original suit was brought upon advice of counsel.

FOURTH. The Court erred in submitting the question of "want of probable cause" to the jury instead of deciding it as a matter of law.

FIFTH. The Court erred in not holding as a matter of law:

1. That the plaintiff had not shown want of probable cause."

2. That the defendant had affirmatively established probable cause in that he proved without rebuttal on contradiction that he had instituted the suit upon advice of counsel.

SIXTH. That there being no evidence showing a want of probable cause in instituting the suit, the Court erred in allowing the issue to become in substance: "Did the defendant maliciously and without probable cause keep the suit pending?" and in this connection grievously erred in allowing the admission of all of the evidence of the plaintiff on that issue while wholly excluding the evidence of the defendant, that is, in permitting the plaintiff to introduce evidence tending to show that the defendant acted in bad faith in not dismissing the original suit on account of knowledge which came to him after its institution, and at the same time excluding evidence offered by the defendant, to the contrary and tending to show that facts came to him after the institution of the suit which indicated that the suit was meritorious. The substance of the evidence admitted and excluded in this connection and the rulings made by the Court are as follows:

The plaintiff Ballaine testified over objection that the [94] defendant Boland heard one Keeler give a deposition after the institution of the original suit which should have convinced the defendant that the suit was not meritorious. The defendant was not allowed to rebut this or to testify as to what Keeler had told him in explanation and amplification of his testimony immediately after giving it, the Court ruling generally that the defendant could not offer evidence of any facts coming to his knowledge after the institution of the suit which appeared to show that the suit was meritorious.

The plaintiff Ballaine was also permitted over objection to testify that the defendant Boland was present when the bank books were examined and depositions taken tending to show that the $4,000.00 paid for the land in dispute was ultimately paid by Ballaine and not out of railroad funds and that even then the defendant would not and did not dismiss the suit. Boland was not allowed to testify that at the same time and place Ballaine admitted that he as an officer of the Railway Company had at one time signed a prospectus gotten up to advertise the railway bonds, which prospectus stated that the townsite of Seward belonged to the railroad company, the Court ruling the evidence not admissible because the knowledge came to Boland after the institution of the suit.

SEVENTH. The Court erred in the admission of evidence of damage in that it departed from the true rule in such cases that damages, if any, can only be recovered with respect to actual sales prevented and

specifically pleaded and proved. The plaintiff was erroneously permitted to testify that he owned about six hundred lots and that their sale price was depreciated about fifty per cent. He was permitted to estimate and state values from the prospective prices stated in options he had given when it was announced that Seward would be the terminus [95] of the Government railroad. He had given no contracts at these prices, only options. The only optionees named were business houses, who, as the plaintiff admitted, never did establish branches in Seward. The foregoing is the substance of the loose testimony upon which the jury was erroneously allowed to speculate and upon which it must of necessity have based at least $22,000.00 of its verdict.

EIGHTH: The Court erred in allowing the plaintiff Ballaine to testify that he had incurred the enmity of Patrick, one of the attorneys who advised the defendant to bring the original suit, and that Patrick threatened to retaliate. This evidence was offered as plaintiff's counsel stated on the theory that it tended to prove defendant's malice.

NINTH. The Court erred in refusing to strike the evidence as to Patrick's threat, at the close of plaintiff's evidence, it not having been shown that the defendant had any knowledge of it.

TENTH. The Court erred in denying defendant's motion for a new trial which specifically pointed out all of the foregoing errors and was duly filed within forty-two days after judgment as by rule provided.

WHEREFORE, the defendant prays that the said judgment be reversed and the District Court directed to dismiss the said action as prayed in the answer herein, or, in the alternative, to grant a new trial thereof.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant.

Received a copy of the foregoing Assignments of Error this 10th day of July, 1919.

CARROLL B. GRAVES and
LYONS & ORTON
Attorneys for Plaintiff. [96]

[Indorsed]: Assignments of Error. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [97]

[Title of Court and Cause.]

Petition for Order Allowing Writ of Error.

The said defendant, W. J. Boland, feeling himself aggrieved by the judgment entered in said cause on November 27, 1918, in favor of said plaintiff and against said defendant for the sum of $30,000.00, and plaintiff's costs and disbursements, which judgment became final by entry of an order denying defendant's motion for a new trial on January 21st, 1919, and in which judgment and the proceeding leading up to the same certain errors were committed to the prejudice of said defendant, which more fully appears from the assignment of errors filed herewith,

comes now and prays said Court for an order allowing the defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of under, and according to the laws of the United States in that behalf made and provided, and also prays that the Court in said order fix the amount of security which the defendant shall give for the plaintiff's costs, and further, that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

Dated this 10th day of July, 1919.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant. [98]

Copy of the foregoing petition for order allowing writ of error received, and due service acknowledged this 10th day of July, 1919.

CARROLL B. GRAVES and
LYONS & ORTON
Attorneys for Plaintiff.

[Indorsed]: Petition for Order Allowing Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [99]

_____,

[Title of Court and Cause.]

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on to be heard in the courtroom of said court in the city of Seattle, Washington, upon the petition of the defendant, W. J. Boland, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth District, together with an assignment of errors also filed in due time; and also praying that a transcript of the record duly authenticated may be sent to said court in order that said alleged errors may be examined.

The Court having duly considered the same does hereby allow the writ of error and grants the several *prays* of said petition on condition that the defendant furnish a surety bond to secure plaintiff's costs in the sum of $500.00.

Dated this 10th day of July, 1919.

EDWARD E. CUSHMAN,
Judge.

Received a copy of foregoing order this 10th day of July, 1919.

CARROLL B. GRAVES and
LYONS & ORTON
Attorneys for Plaintiff.

[Indorsed]: Order Granting Writ of Error and Fixing Amount of Bond. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [100]

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that, we, W. J. Boland, the defendant above named, and United States Fidelity & Guaranty Company, a Maryland corporation, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto John E. Ballaine the plaintiff above named, in the sum of Five Hundred Dollars, to be paid to the plaintiff, his executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Dated and executed this 10th day of July, 1919.

The condition of this obligation is such that whereas the said defendant has obtained from the above-entitled court a writ of error to reverse the judgment in said action, and a citation is about to be issued citing and admonishing the plaintiff to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit.

NOW, THEREFORE, if the said defendant W. J. Boland shall prosecute the said writ of error and pay or cause to be paid all costs that may be awarded against him in said proceedings, then this obligation shall be void, otherwise it shall remain [101] in full force and effect.

W. J. BOLAND,
By BRONSON, ROBINSON & JONES,
His Attorneys.

UNITED STATES FIDELITY AND GUARANTY CO.
By JOHN C. McCOLLISTER,
Attorney in Fact.

[Seal of U. S. F. & G. Co.]

The sufficiency of the surety on the foregoing bond is approved this 10th day of July, 1919.

EDWARD E. CUSHMAN,
Judge of said Court.

Copy of foregoing bond received, and due service acknowledged this 10th day of July, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for Plaintiff.

[Indorsed]: Appeal Bond. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [102]

[Title of Court and Cause.]

Writ of Error (Copy).

United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between John E. Ballaine, plaintiff, and W. J.

Boland et al., defendants, a manifest error hath happened, to the great damage of the said W. J. Boland, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the first day of August, 1919, that the record and proceedings aforesaid being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 10th day of July, in the year of our Lord one thousand nine hundred and [103] nineteen, and of the Independence of the United States the one hundred and forty-third.

[Seal] F. M. HARSHBERGER,

Clerk of said District Court of the United States, for the Western District of Washington.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,
United States District Judge, for the Western District of Washington.

Copy of within writ of error received and due service of the same acknowledged this 10th day of July, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for Plaintiff.

[Indorsed]: Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [104]

[Title of Court and Cause.]

Citation on Writ of Error (Copy).

United States of America,—ss.
To John E. Ballaine, GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the ninth day of August, 1919, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein W. J. Boland is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should

not be corrected and speedy justice should not be done to the parties in that behalf.

Dated the 10th day of July, 1919.

EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington.

Attest: _____,

Clerk of said United States District Court for the Western District of Washington.

_____,

Deputy. [105]

We hereby, this 10th day of July, 1919, acknowledge service of the foregoing Citation at the city of Seattle, Washington.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for John E. Ballaine.

Received a copy of the foregoing citation lodged with me for defendant in error this 10th day of July, 1919.

_____,

Clerk of said United States District Court.

[Indorsed]: Citation on Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [106]

[Title of Court and Cause.]

Stipulation Relating to Exhibits and Depositions on Appeal.

It is herewith stipulated, subject to the order of the Court, that the clerk of this court in making up his return to the writ of error herein shall include therein and as part thereof the originals instead of copies of the following matters heretofore attached to and by an order of Court, made a part of the bill of exceptions.

Plaintiff's Exhibits 1, 2, 3 and 4.

Deposition of T. C. West.

Deposition of George H. Patrick, with exhibits thereto.

Dated December 1, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for Plaintiff.
BRONSON, ROBINSON & JONES,
Attorneys for Defendant.

[Indorsed]: Stipulation Relating to Exhibits and Depositions on Appeal. Filed in the United States District Court, Western District of Washington, Northern Division. December 1, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [107]

[Title of Court and Cause.]

Order for Sending Up Original Exhibits and Depositions.

Pursuant to written stipulation of the parties, this day made and filed, and it being the opinion of the Court that such procedure is desirable and proper,—

IT IS ORDERED that the clerk of this court shall, in making up his return to the writ of error in this cause, send to the United States Circuit Court of Appeals for the Ninth Circuit the original exhibits and depositions in said stipulation mentioned.

Dated at Seattle, Washington, this first day of December, 1919.

EDWARD E. CUSHMAN,
Judge of the Above-entitled Court.

[Indorsed]: Order for Sending Up Originals. Filed in the United States District Court, Western District of Washington, Northern Division. December 1, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [108]

[Title of Court and Cause.]

Stipulation as to Printing Record.

To avoid unnecessary repetition and expense, IT IS HEREBY STIPULATED, that in printing transcript of record in the above-entitled cause, there shall be omitted from the pleading, orders and other papers (other than the stipulation relative to the pleadings, the amended complaint, answer and judg-

ment, and the depositions of West and Patrick), the title of the court, and the number and title of the cause.

IT IS FURTHER STIPULATED that in printing the depositions of T. C. West and George H. Patrick, the stipulations for the taking of the same, and the commissions issued for the taking of the same, shall be omitted.

IT IS FURTHER STIPULATED that in lieu of printing the copies of enclosures attached to Exhibit 13 of the deposition of George H. Patrick and scheduled as such in said exhibit, the clerk of the Circuit Court of Appeals in preparing the record for printing may insert a note stating in substance that said enclosures referred to are omitted for the reason that they are copies of exhibits already printed, that is, of Exhibits 1, 2, 3, 4, 5 and 7 of the said deposition.

Dated this first day of December, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for Plaintiff.
BRONSON, ROBINSON & JONES,
Attorneys for Defendant. [109]

[Indorsed]: Stipulation as to Printing Record. Filed in the United States District Court, Western District of Washington, Northern Division. December 1, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [110]

[Title of Court and Cause.]

Stipulation as to Record and Praecipe for Transcript.

IT IS HEREBY STIPULATED between the parties hereto that the clerk of this court in making up his return to the writ of error herein shall include therein copies, as hereinafter specified, of the following papers and no others:

Stipulation as to pleadings made September 17, 1918, and filed November 26, 1918.

Amended and supplemental complaint, filed September 18, 1918.

Answer of W. J. Boland, filed on July 25, 1916.

Judgment, filed on November 27, 1918.

Petition for new trial, filed on January 6, 1919.

Order denying petition for new trial made January 21, 1919.

Bill of exceptions lodged on February 20, 1919, originals, Plaintiff's Exhibits 1, 2, 3 and 4, and the original depositions of T. C. West and George H. Patrick not to be in typewritten record but to be sent down separately, as provided in stipulation and order of December 1, 1919.

Order settling bill of exceptions.

Assignments of error.

Petition for order allowing writ of error.

Order granting writ of error and fixing amount of cost bond.

Bond.

Writ of error.

Copy of writ of error lodged with clerk.

Original citation and acceptance of service thereof.

Copy of citation lodged with clerk. [111]
Stipulation as to exhibits and depositions.
Order as to sending up originals.
Stipulation as to record and praecipe for transcript.
Stipulation as to printing record; which comprises all papers, exhibits, depositions, etc., necessary to hearing the said cause on writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, provided, however, that either party may supplement the record in accordance with the rules of court by adding thereto any matter of record not hereinbefore mentioned.

Dated December 1, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for Plaintiff.
BRONSON, ROBINSON & JONES,
Attorneys for Defendant.

To the Clerk of the Above-entitled Court:

Please prepare at our expense Transcript of Record in accordance with the foregoing stipulation.

BRONSON, ROBINSON & JONES.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

BRONSON, ROBINSON & JONES,
Attorneys for Defendant.

[Endorsed]: Stipulation as to Record and Praecipe for Transcript. Filed in the United States District Court, Western District of Washington, North-

ern Division. Dec. 1, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [112]

[Title of Court and Cause.]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages, numbered from 1 to 112, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by stipulation of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [113]

Clerk's fee (Sec. 828, R. S. U. S.), for making record, certificate or return, 270 folios at 15c $40.50
Certificate of Clerk to transcript of record—4 folios at 15c ..... .60
Seal to said certificate ..... .20

I hereby certify that the above cost for preparing and certifying record amounting to $41.30, has been paid to me by counsel for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original Citation issued in this cause.

In Witness Whereof I have hereto set my hand and affixed the seal of said District Court of Seattle, in said District, this 2d day of December, 1919.

[Seal] F. M. HARSHBERGER,
Clerk United States Circuit Court. [114]

Writ of Error (Original).

[Title of Court and Cause.]

United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between John E. Ballaine, plaintiff, and W. J. Boland et al., defendants, a manifest error hath happened, to the great damage of the said W. J. Boland, as is

said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the ninth day of August, 1919, that the record and proceedings aforesaid being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 10th day of July, in the year of our Lord one thousand nine hundred and [115] nineteen, and of the Independence of the United States the one hundred and forty-third.

[Seal] F. M. HARSHBERGER,

Clerk of said District Court of the United States, for the Western District of Washington.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,

United States District Judge, for the Western District of Washington.

Copy of within writ of error received and due service of the same acknowledged this 10th day of July, 1919.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for Plaintiff. [116]

[Endorsed]: No. ——. In the District Court of the United States for the Western District of Washington, Northern Division. Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [117]

[Title of Court and Cause.]

Citation on Writ of Error (Original).

United States of America,—ss.

To John E. Ballaine, GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the ninth day of August, 1919, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein W. J. Boland is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the 10th day of July, 1919.

EDWARD E. CUSHMAN,

United States District Judge, for the Western District of Washington.

Attest: ——————————,

Clerk of said United States District Court for the Western District of Washington.

——————————,

Deputy. [118]

We hereby, this 10th day of July, 1919, acknowledge service of the foregoing Citation at the city of Seattle, Washington.

CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for John E. Ballaine.

Received a copy of the foregoing Citation lodged with me for defendant in error this 10th day of July, 1919.

——————————,

Clerk of said United States District Court. [119]

[Endorsed]: No. ——. In the District Court of the United States for the Western District of Washington, Northern Division. Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 10, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [120]

[Endorsed]: No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. W. J. Boland, Plaintiff in Error, vs. J. E. Ballaine, De-

fendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed December 5, 1919.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Title of Court and Cause.]

Stipulation Extending Time to File Record in Appellate Court.

The undersigned, attorneys for both parties in the above-entitled cause, respectively represent to the Court:

That a writ of error has been sued out in said cause directed to the District Court of the United States for the Western District of Washington, Northern Division, said writ being returnable on the ninth day of August, 1919;

That the record in said cause is very voluminous, and will require a great amount of time to prepare, and the preparation thereof will entail a large expense;

That it is believed by the attorneys for both parties that the cause may be compromised and settled if sufficient time be had for the purpose, it being necessary to consult with parties resident in Toronto, Canada, some of whom are reputed to be abroad:

WHEREFORE, IT IS STIPULATED that if the Court will permit that the time for filing the record in the above-entitled court may be extended one hundred twenty (120) days, and we herewith petition the Court to make an order so extending the time, or, if in the judgment of the Court the extension is too great, to extend the time for some lesser period.

Seattle, Washington, July 28, 1919.

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,
Attorneys for Plaintiff in Error.
CARROLL B. GRAVES and
LYONS & ORTON,
Attorneys for Defendant in Error.

[Endorsed]: No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 31, 1919. F. D. Monckton, Clerk. Refiled Dec. 5, 1919. F. D. Monckton, Clerk.

[Title of Court and Cause.]

Order Enlarging Time to File Record in Appellate Court.

Upon the petition and stipulation of the above-named parties to the above-entitled cause, duly exhibited to this Court, and for good cause shown,—

IT IS ORDERED that the time provided by the rules in which the plaintiff in error shall file the record of the cause in this court shall be extended a

period of one hundred twenty (120) days from the ninth day of August, 1919.

Signed this 31st day of July, 1919.

HUNT,
United States Circuit Judge.

[Endorsed]: No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jul. 31, 1919. F. D. Monckton, Clerk. Refiled Dec. 5, 1919. F. D. Monckton, Clerk.

In the District Court of the United States for the Western District of Washington.

No. 3122.

J. E. BALLAINE,

Plaintiff,

vs.

W. K. BOLAND et al.,

Defendants.

Deposition of T. C. West on Behalf of Defendants.

In the District Court of the United States for the Western District of Washington.

No. 3122.

J. E. BALLAINE,

Plaintiff,

vs.

W. J. BOLAND et al.,

Defendants.

(Deposition of T. C. West.)

BE IT REMEMBERED that on the twenty-second day of January, 1917, at 11 o'clock A. M., under and pursuant to the Commission to me issued by the Honorable Jeremiah Neterer, Judge of the above-entitled court and in the above-entitled cause, upon stipulation by counsel for the plaintiff and defendants, I attended at the time and place named therein, and at the request of the defendants, there being no objection or appearance on behalf of the plaintiff, adjourned the taking of said deposition until the hour of 11 o'clock A. M. on January 27th, 1917, at the office of Mr. T. C. West, 1170 Phelan Building, Market Street, San Francisco. And now at the hour of 11 o'clock A. M., January 27th, 1917, at the said office of said T. C. West, under and pursuant to said Commission, the following proceedings were had. There being Ira Bronson, Esq., upon behalf of the defendants; no appearance being made on behalf of the plaintiff.

Mr. T. C. WEST, a witness on the part of the defendants, duly sworn, testified as follows:

Direct Examination.

(By IRA BRONSON, Esq.)

Q. Will you please state your name, residence and profession?

A. T. C. West; residence, 1204 Walnut Street, Alameda, California; my office address, No. 1170 Phelan Building, San Francisco; I am an attorney at law.

(Deposition of T. C. West.)

Q. How long have you been a practicing attorney at law?

A. For almost twenty-six years; not altogether in the United States, for about seventeen years in California, previously in Canada.

Q. Are you acquainted, Mr. West, with the parties plaintiff and defendants in the action entitled J. E. Ballaine, Plaintiff, vs. W. J. Boland, F. G. Jemmett and J. E. Stavert, now pending in the District Court of the United States of the Ninth Judicial Circuit for the Western District of Washington, Northern Division?

A. I know them all personally, except Mr. Stavert.

Q. Were you acquainted with the parties to an action brought in the United States District Court of the Territory of Alaska, Third Division, enttiled The Alaska Northern Railway Company vs. J. E. Ballaine and Frank L. Ballaine and the Alaska Central Railroad? A. Yes.

Q. Were you one of the attorneys for the plaintiff in that case? A. Yes.

Q. Were you acquainted, during his lifetime, with Colonel Swanitz? A. Yes.

Q. Mr. West, will you go on and state in your own way, your connection with and your acquaintance with the facts and the witnesses in that matter prior to the institution of the action, and what advice and counsel you gave to the defendants in this action and particularly to Mr. W. J. Boland with reference to the bringing of the former action?

A. I had known Colonel Swanitz for probably a

(Deposition of T. C. West.)

couple of years before the action was commenced. Mr. Boland, I had known personally for quite a long time before the action, and I believe I formerly knew him a great many years ago in Toronto. Mr. Jemmett, I had met once in Washington. The matter of bringing the action against the Ballaines was discussed very fully by Mr. Boland and myself and Colonel Swanitz, and I also consulted in this action with Mr. Patrick, an attorney in Washington, D. C. All the data necessary for the action was gathered during a period covering about a year, and I constantly urged the bringing of the action, but nothing was definitely settled as to its actual commencement until Mr. Boland came to San Francisco from Toronto to consult with me. Mr. Boland and I thereupon prepared the complaint and cabled it to Valdez, Alaska, to my agents there, Messrs. Donohoe & Dimond. The reason for cabling was, that there was some question as to whether or not the statute of limitations would run against the cause of action in case the suit was not started immediately after Mr. Boland arrived here.

Q. Will you state who Colonel Swanitz was with reference to any prior matters or business of the Alaska Northern or the Alaska Central Railroad?

A. Colonel Swanitz had formerly been the chief engineer for the Alaska Central Railway and was interested also in the Tanana Construction Company and in the Tanana Railway Construction Company. I understood from him that he had previously had access to the books, papers and documents of the

(Deposition of T. C. West.)

Alaska Central and the Construction Company mentioned, and from my frequent consultations with him believed and still believe that he knew all of the facts upon which we relied for the success of the action. His familiarity with it, correspondence and papers which I afterwards had occasion to examine, convinced me of his thorough knowledge of the matters that would arise in the course of the trial.

Q. Mr. West, Colonel Swanitz was afterwards a witness for the plaintiff in that action, was he not?

A. Yes.

Q. State whether or not his evidence as given upon the witness-stand in the case agreed with substantially what he had told you his evidence would be in your interviews with him prior to bringing the action. A. No, it did not.

Q. Just state in your own way, if you will, whether the discrepancy was of a serious character or would produce good or bad effect upon the plaintiff's case in that case.

A. Yes, the difference in the story told on the witness-stand and that told to Mr. Boland in my presence and to me personally on many occasions, was very great and in one respect very vital to the interests of the plaintiff. As an illustration, both Mr. Boland, Mr. Patrick and myself were always informed by Colonel Swanitz that the directors and officers, including himself, of the Alaska Central Railway Company and of the Construction Company mentioned, had always understood, and it was a matter of general knowledge to them that the Ballaines

(Deposition of T. C. West.)

held the townsite of Seward for and on behalf of the Alaska Central Railway.

Q. Was the Alaska Central Railway Company the predecessor in interest of the Alaska Northern Railway Company, the plaintiff in the former action?

A. Yes.

Q. Were Ballaines, or either of them, members of the Directorate of the Alaska Central Railway Company?

A. John E. Ballaine was and I believe Frank Ballaine was also.

Q. Did you advise Mr. Boland whether or not in your opinion the Alaska Northern Railway Company had a good cause of action against the defendants Ballaine in that case to the recovery of the townsite which was the subject of the action subsequently brought?

A. Yes, I so advised them and still believe that action ought to have prevailed.

Q. Did you advise them, Mr. West, and do you know whether or not Mr. Patrick advised them, or if you do not know as to him, did you advise them yourself as to what was the duty of Mr. Boland, Mr. Stavert and Mr. Jemmett as trustees with reference to bringing such suit?

A. Yes, I advised Mr. Boland that it was his duty to bring the action in order to protect those for whom he and Jemmett and Stavert were trustees, and I understood from Mr. Patrick that he also had advised them to the same effect.

Q. Mr. Patrick is a practicing attorney at law in

(Deposition of T. C. West.)

Washington, D. C., is he not?

A. Yes; of a great many years' experience, and Mr. Patrick was thoroughly familiar with all of the details of the Alaska Central and Alaska Northern, in fact more familiar with them than any of us.

Q. What conversation did you have with Colonel Swanitz at any time prior to the bringing of this former action with reference to Mr. Ballaine's relationship to the townsite?

A. I had a great many conversations with Colonel Swanitz, and in all of them where the matter was discussed, he informed me that John E. Ballaine never claimed to own the townsite personally, but that he always acknowledged that he was holding it for and on behalf of the Alaska Central Railway Company, and the first time I ever heard Colonel Swanitz say anything to the contrary was when interrogated on that subject at the trial of the action.

Q. And what was his evidence then?

A. When he stated that John E. Balline always claimed to own the townsite, which came to me as a complete surprise.

T. C. WEST.

United States of America,
State of California,
City and County of San Francisco,—ss.

I, James Mason, a notary public in and for the city and county of San Francisco, State of California, and Commissioner named in the commission hereto annexed, DO HEREBY CERTIFY that on the 27th day of January, 1917, at 11 o'clock A. M.,

upon request of counsel for defendants, there being no objection from or appearance on behalf of the plaintiff, at the city of San Francisco, in the county of San Francisco, and State of California, I was attended by Ira Bronson, Esq., counsel for defendants, no appearance being made on behalf of the plaintiff, and the said witness, who was of sound mind and lawful age, having been by me first carefully examined and cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the within-entitled cause, gave his testimony, which by consent of counsel for the defendant was taken down by a stenographer appointed by me for that purpose, in the presence of the witness and from his statements, and the said stenographic notes were afterwards reduced to writing by a typewriter, and the signature of the witness to the same being subscribed in my presence.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said commission named, nor in any way interested in the event of the cause named therein.

IN TESTIMONY WHEREOF I have hereunto set my hand and seal this 9th day of February, A. D. 1917.

[Seal] JAMES MASON,
Notary Public in and for the City and County of San Francisco, State of California, Commissioner.

My commission will expire December 4th, 1919.

[Endorsements on envelope containing Deposition of T. C. West]: Addressed to Frank L. Crosby, Esq.,

Clerk of the District Court of the United States for the Western District of Washington, Seattle, Wash. From James Mason, Notary Public, 430 California St., San Francisco.

Filed in the United States District Court, Western District of Washington, Northern Division. February 13, 1917. Frank L. Crosby, Clerk. By ————, Deputy.

No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed December 5, 1919. F. D. Monckton, Clerk.

Published order open court, Sept. 18th.

In the District Court of the United States for the Western District of Washington, Northern Division.

Number 3122.

J. E. BALLAINE,

Plaintiff,

versus.

W. J. BOLAND et al.,

Defendants.

Deposition of George H. Patrick on Behalf of Defendant.

Deposition of George H. Patrick, taken before me, Alexander H. Galt, a notary public in and for the District of Columbia, at Room 209, The Southern Building, 15th and H Streets, Northwest, in the city of Washington, D. C., Tuesday, March 6th, 1917,

(Deposition of George H. Patrick.)

pursuant to the annexed Stipulation and Commission to take deposition in the above-entitled cause.

APPEARANCES:

No appearance for Plaintiff.

Mr. W. J. BOLAND, for Defendants.

GEORGE H. PATRICK, a witness of lawful age, being by me first duly sworn, testified as follows:

(Examined by Mr. W. J. BOLAND.)

Q. Mr. Patrick, will you please state your name, residence and profession.

A. My name is George H. Patrick; residence, Montgomery, Alabama; I am a lawyer, have been in the practice about fifty years and I have been practicing in the city of Washington for the last twenty years.

Q. Are you acquainted with the parties plaintiff and defendant in the action entitled J. E. Ballaine, Plaintiff, versus W. J. Boland, F. G. Jemmett and W. E. Stavert, now pending in the District Court of the United States, of the Ninth Judicial District for the Western District of Washington, Northern Division? A. I am.

Q. Were you acquainted with the parties to an action brought in the United States District Court of the Territory of Alaska, Third Division, entitled Alaska Northern Railway Company versus J. E. and Frank L. Ballaine and the Alaskan Central Railroad? A. I was.

Q. Did you know Col. A. W. Swanitz in his lifetime? A. I did.

Q. How long had you known Col. Swanitz?

(Deposition of George H. Patrick.)

A. Since about 1910, certainly as early as that.

Q. Who was Col. Swanitz, having regard to the Alaska Northern and the Alaska Central Railways?

A. He was chief engineer of the Alaska Central and of the Alaska Northern Railway Companies.

Q. Will you go on and state in your own way your connection with and your acquaintance with the facts and the witnesses in that action of the Alaska Northern Railway Company against the Ballaines and the Alaska Central Railway prior to the institution of the action and what advice you gave to the defendants in this present action, particularly to W. J. Boland and W. E. Stavert with reference to the bringing of the former action?

A. I was the attorney,—called the General Attorney—of the Alaska Northern Railway Company from January, 1910, the date of its organization, until that railway was sold to the Government of the United States. I was located in Washington all the time in correspondence with all the officials of the company wherever they were located, constantly receiving inquiries for advice and instructions, which I gave, as well as attending to whatever matters the company might have in Washington. I knew Col. Swanitz very well, received a great many communications from him, and my first information of any ground for a suit by the company for the recovery of the Seward Townsite came from him in a letter written by him to United States Senator Chamberlain, bearing date June 2, 1913, which I received a few days later from Col. Swanitz. Reference was

(Deposition of George H. Patrick.)

made therein to the townsite, and I at once inquired of him concerning it. I received a considerable number of letters from him bearing on the subject and I wrote a number to him, and I had several conversations personally with him about the matter here in Washington.

Q. Then you produce, and I ask to have it marked as Exhibit 1, a copy of a letter from A. W. Swanitz to Hon. Geo. E. Chamberlain, dated June 2d, 1913. That copy of the letter was received by you through the mails from Col. Swanitz, was it? A. Yes.

Q. Then you also produce, Mr. Patrick, certain original letters from Col. Swanitz to you, dated July 3d and two letters dated July 30, 1913; one of August 17, 1913; one of January 15, 1914; one of February 11, 1914; one of February 14, 1914; one of September 10, 1914, and one of November 3, 1914, and which I ask to have marked as exhibits here Numbers 2 to 10, inclusive, for the purpose of this examination.

Those letters are produced from your files, are they, Mr. Patrick? A. Yes, sir.

Q. You know Col. Swanitz' handwriting and his signature, do you? A. I do.

Q. All those letters, I believe, but one, are written in his own hand?

A. All are in his own handwriting except one in typewriting, but that is signed with his signature, and to which is attached a footnote in his own handwriting.

(Deposition of George H. Patrick.)

Q. You also produce a copy of a letter from E. R. Keeler, attached to Col. Swanitz' letter of February 11, 1914, Exhibit 7. That is a copy of a letter in Col. Swanitz' handwriting purporting to be a copy of a letter from E. R. Keeler to John E. Ballaine, dated September 23, 1904. That is correct, is it, Mr. Patrick?

A. Yes, it is addressed to Jno. E. Ballaine, President. That copy is in Col. Swanitz' handwriting.

Q. All those letters, I believe, contain statements and facts relating to the townsite of Seward and the question involved in the action as to the ownership of that townsite? A. Yes, sir.

Q. As a result of these letters will you tell me what you did and what advice you gave to Boland, Stavert and Jemmett, or either of them?

A. I advised them that in my judgment the facts communicated to me showed that the Seward Townsite had been purchased with money belonging to the Alaska Central Railway Company, or the construction company, which was the same thing; that Ballaine constituted himself a trustee holding for the company and that the title and possession of the townsite could and should be recovered to the Railway Company and be made a part of its assets. I also advised them, at least I advised Messrs. Stavert and Boland—I am not sure as to Mr. Jemmett, although I believe I did tell him the same thing—that in case action should not be brought by them they might be held liable for not having faithfully col-

(Deposition of George H. Patrick.)

lected and turned into the treasury of the Company one of its most valuable assets.

Q. Did you know what the relationship was existing between the townsite company, the railway and Jemmett, Stavert and Boland? A. I did know.

Q. Will you state what your knowledge was, or what you were told of their relationship to the company and to the Alaska Northern Railway?

A. I had been told that they were trustees, if not nominal at least actual trustees, perhaps under the name of the committee for the bondholders of the Alaska Central Railway Company, which purchased at marshal's sale all the assets of that company. I had seen the documents which constituted them such trustees; I knew of the deposit of bonds and receipts given by them, and I knew from them and from the bondholders and from the conveyance made that they had transferred the assets of the Alaska Central Railway Company to the Alaska Northern Railway Company, which was organized to purchase them and to operate the road, and which did purchase and operate it.

Q. Did you know who was president of the Alaska Northern Railway Company? A. I did.

Q. Who was president?

A. From the time that I first heard of the claim to the townsite, as before stated, William E. Stavert was the president.

Q. That is, William E. Stavert, one of the defendants in this action?

A. Yes, one of the defendants in. this action.

(Deposition of George H. Patrick.)

Q. Did you know who was treasurer of the Alaska Northern Railway Company?

A. F. G. Jemmett was the treasurer.

Q. And he is also one of the defendants in this action? A. He is also one of the defendants.

Q. Did you know a firm, or two gentlemen by the name of Shedd in Chicago?

A. I knew of the firm and I knew Mr. C. B. Shedd personally.

Q. Did you know how they were interested in the Alaska Northern Railway Company?

A. Yes, as bondholders.

Q. Did you ever have any discussion with them, or with any one representing them, on the question of the townsite of Seward, which was the subject of the suit of the Alaska Northern Railway Company against Ballaine?

A. I am not sure that that was ever the subject of discussion between Mr. Shedd and myself. My impression is that we did not discuss it. I have seen some of Mr. Shedd's letters on the subject in the hands of Col. Swanitz, and Col. Swanitz related to me something of his conversation with them on the subject.

Q. Did he tell you of any action, or proposed action, which the Shedds intended to take, either in connection with the townsite or subsequently against the trustees? A. He did.

Q. What did he tell you?

A. Col. Swanitz told me that the Shedd Brothers, as holders of bonds, would almost certainly, and they expected to proceed against the trustees to hold them

(Deposition of George H. Patrick.)

for any deficiency in, the amount they might receive in the distribution of the proceeds for the railroad if it should appear that suit ought to have been brought or that suit might have been brought with reasonable chance of success.

Q. Did he make any statement as to what their claim was so far as the Townsite of Seward was concerned?

A. Yes; that their claim was that as part owners of the Alaska Northern Railway Company the right, title and interest that that company had in Seward was something to which they might and should look for the satisfaction of their bonds.

Q. Do you know the firm of Bicknell, Bain, Macdonell & Gordon, solicitors at Toronto, Canada?

A. I know them by reputation and I have had correspondence with them.

Q. Did you know who they represented in connection with the Alaska Northern Railway Company or the Alaska Syndicate, managed by the defendants?

A. I knew from you and I think I knew from them and otherwise, from others connected with the matters in Canada, that they represented certain banks in Canada which had taken over the assets of the Sovereign Bank of Canada, which was the very large majority owner of the Alaska Central Railway securities and also of the road after the sale.

Q. Did you have any correspondence with Bicknell, Bain, Macdonell & Gordon? A. I did.

Q. Having special reference to the townsite of Seward?

A. I did. They wrote to me several letters, which

(Deposition of George H. Patrick.)

I answered, and they wrote to me in the capacity I have mentioned.

Q. And you produce from your files three carbon copies of letters from you to Bicknell, Bain, Macdonell & Gordon, of what dates, please?

A. September 12, 15 and 16th, 1914.

Q. And there are certain copies of letters attached to the letter of September 16, 1916?

A. I can and do produce carbon copies of the letters.

Q. When were these carbon copies made?

A. They were made on the respective days they bear date.

Q. At the same time as the originals?

A. At the same time as the originals.

Q. What happened to the originals?

A. The originals were duly mailed to that firm.

Q. On or about their respective dates?

A. On the days they bear date.

Q. I will ask to have those carbon copies marked as exhibits 11, 12 and 13 for this record. Those carbon copies are produced from your files in your office, are they? A. From my files in my office.

Q. Mr. Patrick, you have had certain correspondence with Mr. Stavert, have you not? A. Yes, sir.

Q. Have you got carbon copies of certain letters which you mailed to him? A. I have.

Q. Will you produce them, please?

A. I have a carbon copy of my letter to Mr. Stavert bearing date December 5, 1914, which I now produce.

Q. When was that carbon copy made?

A. At the same time that the original was made.

(Deposition of George H. Patrick.)

Q. And what happened to the original?

A. The original was duly mailed to Mr. Stavert in Canada.

Q. I will ask to have that marked as exhibit 14 for this record.

Did you have any doubt about the statements contained in Col. Swanitz' letters and in his interviews with you, I mean as to the correctness or reliability of what he stated?

A. None whatever. Everything that he stated to me that I had opportunity to investigate was amply confirmed.

Q. And as a result of the conversations and the correspondence which you had an opportunity to examine, what was your opinion as to the result of an action that might be brought to recover that townsite?

A. It was my opinion that the action must certainly result in, the recovery of the townsite, and I so advised Mr. Stavert, the president, Mr. Boland, Mr. Bicknell's firm, Mr. Jemmett and also Mr. G. T. Clarkson, who represented the Canadian banks, for whom Bicknell, Bain, Macdonell & Gordon appeared as counsel.

Q. Is there anything more you want to add to what you have already stated, Mr. Patrick?

A. I do not know that there is. I never had any doubt whatever of the fact that Col. Swanitz, by his own evidence and the documents he had and asserted his ability to get and the evidence of other witnesses he repeated to me would establish clearly the right of

(Deposition of George H. Patrick.)

the railroad company to this townsite. Col. Swanitz was extremely earnest in his assertions of what proof could be made to sustain this contention. He brought Mr. Thomas C. West, of San Francisco, here to consult with me about the case, to go over the facts and the law bearing upon them with him, and he was present at Mr. West's and my interviews, confirming whatever I quoted as coming from him.

Q. You also had rather strong views as to the duties and obligations of the trustees and as to the responsibility that would be imposed on them in case action were not commenced?

A. I had. I had good reason, as I thought, to fear that action would almost certainly be taken against them if they did not bring the suit, and I advised Mr. Stavert and Mr. Boland, I know, that I thought it might be necessary for their own self-protection to bring the suit, even if they failed to maintain it, under all the circumstance.

Q. But you never had any doubt of the result if the evidence could have been obtained according to Col. Swanitz' statements? A. I had not.

And further deponent sayeth not.

GEORGE H. PATRICK.

Subscribed and sworn to before me this sixth day of March, 1917.

[Seal] ALEXANDER H. GALT,
Notary Public in and for the District of Columbia, and Commissioner.

I, Alexander H. Galt, notary public in and for the District of Columbia, the commissioner designated in

the attached commission and stipulation, certify that at the time and place aforesaid, George H. Patrick, a witness on behalf of the defendants in the above-entitled cause, was by me sworn, before any question was put to him, to tell the truth, the whole truth, and nothing but the truth relative to the said cause; and that his answers were taken down in my presence, and his deposition as above set forth was read over to and signed by him, before me, at the time and place aforesaid. I further certify that I have no office connection or business employment of any kind with any of the parties to this suit or with their attorneys; and that I am not in any way interested, either directly or indirectly, in the result of said suit.

In witness whereof I have hereunto set my hand and official seal this 6th day of March, 1917.

[Seal] ALEXANDER H. GALT,
Notary Public and Commissioner.

Notary fee, $25.00. Pd. by W. J. Boland.

Exhibit No. 1 to Deposition of George H. Patrick—Letter, June 2, 1913, Swanitz to Chamberlain.

A. W. SWANITZ,
Chief Engineer and Manager.
ALASKA NORTHERN RAILWAY CO.

Seward, Alaska, June 2nd., 1913.

Hon. Geo. E. Chamberlain,
U. S. Senate,
Washington, D. C.

June 16, Rec.
Jul. 2 A. M.
Jul. 2 Ans.

Dear Senator:

Remembering with pleasure your very courteous

reception of me in Washington last March, permit me to state to you as member of the Senate Committee on Territories the following; My attention has been called to various statements made before your Committee by John E. Ballaine of Seattle.

In such statement on record of your Committee of May 2nd, Part 1, Mr. Ballaine claims to be the originator of the Alaska Central—(Northern) Railway project; claims to have desided the selection of the route; claims to have financed its initial cost, etc.

The congressional record and hearings before a Senate Committee being supposed to furnish facts only and true statements, I desire to object to Mr. Ballaine's statements above as untrue in every particular.

Mr. Ballaine is not the originator of the Alaska Central Railway project. This honor belongs to one J. M. Anderson a well known surveyor of Seattle and a man of the highest integrity. Mr. Anderson pointed out the practicability of such a road and organized and initiated with G. W. Dickinson and other friends in Seattle the Alaska Central Railway, in 1902.

Hon. G. E. C. #2.

Mr. Ballaine had been employed as a clerk up to that time by Jas. Moore, the well known promoter in Seattle, and as the latter tells me, dismissed for cause. He made then the acquaintance of the Surveyor Anderson and hearing of the Alaska railway project offered to act as selling Agent for the stock of the paper project, he to receive one-half of the proceeds of any stock sales. The Seattle Company

proceeded to sell and advertise such stock and by method now considered illegal, disposed of large amounts at figures varying from $3 to $6 a share. They realized about $112,000.00 from such stock sales, principally in small amounts to purchasers in Minnesota, as Senator Knute Nelson may tell you. About $50,000.00 of this money was used for further reconnaissance surveys of the projected road made by Mr. J. M. Anderson. With about $3,000.00 more Mr. Ballaine purchased soldier scrip to locate, what is now, the townsite of Seward, buying with another $4,000.00 the homestead rights of one Alfred Lowell, a half breed, who had settled in 1897 on the present townsite:

In January 1903 Mr. G. W. Dickinson and Ex-Governor McGraw of Seattle called my attention to their plans while visiting in Chicago, told me of their intention to raise funds for such a road and invited my assistance with the result that I asked some of my friends to join the enterprise. As their funds, raised by sale of socalled preferred stock were quite exhausted and the project dead to all intents and purposes, I organized the Tanana Construction Com-

Hon. G. E. C. #3.

pany with aid of one John Dowdle of Chicago and Robert Evans of Pasadena and left for Seward in August, 1903, to initiate construction with funds furnished by these friends. In January 1904, I induced my friends E. A. and C. B. Shedd of Chicago to loan to the project $200,000.00 on security of all stock and bonds of the Alaska Central road, directors G. W. Dickinson, Ex-Governor McGraw, John Dowdle, John E. Ballaine signing such notes with such securities,

to which John E. Ballaine added, as further security, his claim to 160 acres townsite then pending in the General Land Office for patent.

Mr. Dickerman of St. Paul, Minnesota, a business friend of Shedd Bros. of Chicago, being advised of the latters participation in the project purchased bonds to the extent of $50,000.00 which amount with Shedds $200,000.00 enabled me in the summer of 1904 to build approximately 20 miles of the road and with the showing thus made the company was enabled to raise further funds. At the initiative of Ex-Senator Turner of Spokane and selling the property to a snydicate of Canadian Capitalist jointly with Mr. Frost of Chicago, the notes given to Messrs. Shedd were paid, the securities released and further construction started of the reorganized road under the presidency of Mr. A. C. Frost. Their subsequent failure and final reorganization as the Alaska Northern Railway is sufficiently known. It has been officially proved that altogether $5,250.000 has been used to date in the enterprise, and not one cent of which was con-

Hon. G. E. C. #4.

tributed by Mr. Ballaine, excepting what he raised in selling socalled preferred stock in the formed paper project to gullible purchasers, principally in Minnesota. Contrary to his statement before your committee, such preferred stock was not at any time purchased or taken care of by him, or others, and is still held or used as wall paper by the purchasers, to the best of my knowledge and belief.

The above is the true history of the Alaska Central Ry. I refer you to the following most creditable witnesses:

Mr. Frank L. Ballaine, Seward, Alaska.
Mr. Wm. Ballaine, M. D., Bellingham, Wash.
(Brothers of John E. Ballaine.)
Mr. J. M. Anderson, (Anderson Map Co.) Seattle, Wash.
Mr. John E. Dowdle, #145 LaSalle St., Chicago, Ill.
Messrs. E. A. and C. B. Shedd, #306 LaSalle St., Chicago.
Mr. Robert Evans, Los Casitas, Pasadena, Cal.
Mr. A. C. Frost, Com. Exchange Bank Building, Chicago.

I do not wish Mr. Ballaines untrue assertions to go unchallenged into public records and therefore make the above correction to you.

Mr. Ballaines statement in the record regarding his negotiation with Messrs. J. P. Morgan and Co. are to the best knowledge and belief on par with his other presentations. Mr. Perkins denied knowing Mr. Ballaine when called in as a Witness before Judge Read of the U. S. District Court at Valdez and advised the President and Receiver of the Alaska Northern Ry. Co., Mr. O. G. Laberee that he would not at any time consider Mr. Ballaine of suffi-

Hon. G. E. C. #5.

cient import to have any thing to say to him although the latter had constantly importuned him at several occasions for a hearing.

Very truly your,

A. W. SANITZ.

Exhibit No. 2 to Deposition of George H. Patrick—Letter, July 3, 1913, Swanitz to Patrick.

A. W. SWANITZ
Chief Engineer and Manager.
ALASKA NORTHERN RAILWAY CO.

Seward, Alaska, July 3rd, 1913.
Jul. 21, Rec. Jul. 21, P. M.

Geo. H. Patrick Esq.,
Atty. A. N. Ry. Co.,
#514 Southern Building,
Washington, D. C.

Dear Mr. Patrick:—

I have carefully read your letter of June 19th, referring to my letter of June 2nd, to Senator Chamberlain, and note your opinion that Ballaine under the circumstances referred to in my letter to Senator Chamberlain, has clouded his title to the Seward Townsite.

I had this day a conference with Judge Morford, refreshing my memory and comparing official records on file, now state the following: On page 3 of my letter to Senator Chamberlain, I stated that Messrs. E. A. & C. B. Shedd, of Chicago, loaned the paper project $200,000.00 on security of all stocks and bonds of the Alaska Central Road; Directors G. W. Dickinson, Ex-Gov. McGraw, John Dowdle, John E. Ballaine and myself signing such notes payable March, 1905, with such bond and stock securities, to which John E. Ballaine added, as further security, his claim to 160 acres townsite then pending in the Genl. Land Office. I further recited that at the initiative of Ex-Senator Turner, the property was sold,

in the spring of 1905, to the Canadian Syndicate, with Mr. Frost, of Chicago, as President, the notes were paid and all securities released, including the Seward Townsite.

I had stated that John E. Ballaine obtained the money to purchase the Soldiers Scrip, to cover the

G. H. P. #2.

160 acres, with money he acquired, as so-called Fiscal Agent and Secretary, of the Alaska Central paper project, in selling so-called preferred stock, out of the proceeds of which, he received personally 50% as commission.

One Mrs. Alfred Lowell and her sons were the original settlers of the present townsite, lived there for a number of years and had thus acquired certain homestead rights to the 160 acres in question. John E. Ballaine when he made this application for the 160 acres, in the fall of 1902, or spring of 1903, entered into a contract with this Lowell family to pay them $4,000.00 cash and to give them 2½ acres, free of charge, next to the cabin where they lived. This contract was carried in effect in Oct. 1904, and to my personal knowledge the $4000. were then paid out of the Alaska Central Railway Company's funds, or rather those of the Tanana Construction Company which I had organized and which was then building the Alaska Central Railroad, under contract for all of the Alaska Central Railway Company's bonds and stocks. This payment of $4,000.00 I shall swear to and refer further to the two witnesses of the transaction—1st, Frank Ballaine, John E. Ballaine's brother, at that time representing John E. Ballaine,

as Vice-president of our Construction Company. 2nd, Eldridge R. Keeler, Esq., who's present Address is, c/o Monrava Construction Company, 85th, & Steward Ave., Chicago, Ill. Said Mr. Keeler was in 1904 a resident of Seward and Treas. of the Company. as representative of Shedd Bros. of Chicago

G. H. P. #3.

who had furnished the construction money.

When these securities had been released by Shedd Bros., in 1905, the Trustee, Chas. L. Castle, deeded the townsite back to Ballaines, in June, 1905.

According to your view John E. Ballaine did not have a rightful title. Now under an agreement with A. C. Frost, the new president of the Alaska Central Railway Company, Frank Ballaine, under Power of Attorney of John E. Ballaine, made the following settlement, apparently anticipating your views, deeds were made and recorded at that time, as follows:

1st. Alaska Central Railway Co. 7 acres, 4 lots and lease of a strip of right-of-way through the townsite, expiring next year.

2nd. Deed to Ex-Senator Geo. Turner, Director, 40 lots.

3rd. Deed to Ex-Governor McGraw, Director, 10 lots.

4th. Deed to G. W. Dickinson, Director, 10 lots.

5th. Deed to G. Kain, Director, 10 lots.

6th. Deed to O. G. Laberee, Broker, 40 lots.

7th. Deed to Mr. Thompson, of Montreal, Broker, 20 lots.

8th. Deed to Col. G. Mahoney, Director, 20 lots.

9th. Deed to J. M. Anderson, Seattle, who originally planned the Alaska Central Railway and at the time threatened John E. Ballaine, with prosecution, 5 lots.

The remainder of the property, about 1400 lots, was then with John E. Ballaine and his brothers, Frank Ballaine and Dr. Wm. Ballaine. The latter

G. H. P. #4.

had a falling out with his brother and was paid off with $5.000.00 and I have his letter on file now denouncing his brother John as a swindler. Frank Ballaine still holds the majority of the lots of Seward, and I have his letter on file practically stating as facts all I had written to Senator Chamberlain. If ever the road is built from Seward, by private or public enterprise, the lots unsold would have an approximate value of about $900,000.00, which is the reason, as you can readily comprehend, that John E. Ballaine is so anxious and indefatigable a worker on behalf of the dear public and the United States Government.

He has a habit of promising lots galore to everybody, including Chas. Heiffner, representative of the Seattle Chamber of Commerce, for their aid and assistance and has raised the money for his campaign expenses by pledging lots in the Seward Townsite for that purpose. Perhaps the fact that this wholesale lot distribution, to Laberee, Turner and others, is of public record has ke*ep* others from stating matters as plainly as I have stated above to you.

Mr. Jas. A. Haight, our Seattle attorney, should be cognizant of all the facts, but he is very peculiar

and apparently prefers to remain good friends to everybody.

Judge Morford here, whom I esteem highly as a very upright attorney, is attorney for the Ballaines and probably has his limitations in voluntary testimony.

G. H. P. #5.

Senator Chamberlain acknowledges receipt of my letter on June 17th, and tells me that my statements will have his consideration. He sends me copy of Bill 48 and tells me it will be reported favorable to the Senate.

I regret that I had to write so voluminous in order to give you full details. May I ask you to kindly supply the Trustees with copies of this letter?

Sincerely yours,

A. W. SWANITZ.

The books of the old Alaska Central are still being held by the U. S. Govt. ie. prosecuting Attorney. They should show the original contract with John E. Ballaine authorizing him to sell the preferred stock at 50% commission as fiscal Agent.

Question? Why are these books not returned to this Company?

Exhibit No. 3 to Deposition of George H. Patrick—Letter, July 30, 1913, Swanitz to Patrick.

A. W. SWANITZ,
Chief Engineer and Manager.
ALASKA NORTHERN RAILWAY CO.

July 30th, Alameda, Calif.
Aug. 4, Rec.
Aug. 5, Ans.
Aug. 5, Ans.

Geo. H. Patrick, Esq.,
Atty. at Law,
Washington, D. C.
"In re Ballaine."

Dear Mr. Patrick:

In reply to your letter of July 21st in re Ballaine: You state Page 2 "Ballaine positively denied that he sold or had any authority to sell the Cos stock" If it were possible to have him make an affidavit to that effect instead of blowing of hot air before a Committee it would be splendid to have such sworn statement from him as it would be the shortest and simplest way to land him behind the bars where he belongs. Both his brothers—Haight and L. V. Voak (now Fh. Agt. Rock Island Riway, Chicago) and myself with numerous other witnesses would promptly convict him of perjury. To stop his activities in Washington I should certainly advise early action against him. Yes? I informed you correctly that part of our right of way through the townsite is "on lease" only and expires next year when we will have to buy or get off the ground. All of which should

be on record in the old Alaska Central books, minutes and contracts as Mr. Morford advises me.

"In re Forestry affairs."

I have collected copies of our contracts—reports etc. fully covering the Bird creek Timber transaction by which we lost the $24285 worth of logs etc. All this matter as well as the Ballaine affair is rather too lengthy entirely for long distrance correspondence—specially now when I have no typewriter or assistant. When you all get ready to take some definite action I had best be present in person to cover the ground and supply all evidence needed.

The Company in 1909 and 1910 operated sawmills at Glacier and Virgin Creek Mile 75 and 76 to cut bridge ties, guard rails and other necessary bridge timber. Timber found—after passing through the mill—to be partly unsound for railway purposes or defective or too small—was stacked in regular lumber piles at these sawmills. Our Agent in Kern Creek Mile 72 J. B. Patten was instructed to look after this lumber but under no circumstances to sell any of it as we doubted our right to do so. Some of the mines in that neighborhood—the Nutler and Dawson Co.—being unable to secure needed lumber any other way or by purchase—simply stole a lot of it last winter, amounting to about 30000 feet. My Agent Patten reported this to me this spring and was told to get evidence but again cautioned not to dispose of any of this lumber under no circumstances. Now my Superintendent Tozier reports as follows: "The forestry dept, are getting after Nutter and Dawson. In fact, Wood, the forest ranger came right out and asked Patten if he had sold any of the

lumber or had been told to do so by the R. R. Company; Patten said he had not sold and that whatever instruction he had from the Railroad—were his business and not the forestry departments but would volunteer the information that the company forbid the sale of any timber." The forestry man told him that he would be wanted as witness against Nutter and Dawson.

The forestry people are busy as bees in the Chuchach reserve and are evidently going to made a big fight against us. I have seen dozens of press statements recently—all alike—that the forestry department had just saved 24 billion feet of timber from destructive forest fires, on Turn again arm.

I hope to have a chance to get a hearing before the Comittee on the Alaska forestry question. I shall prove that the recent forest fire on Bird Creek could have only been started by the U. S. forester there.

I find Henry Clark will be in San Francisco Oct. 14th and have arranged to be the chairman of a reception Comittee to receive and entertain him on arrival.

Yours truly,
A. W. SWANITZ.

Exhibit No. 4 to Deposition of George H. Patrick—Letter, July 30, 1913, Swanitz to Patrick.

A. W. SWANITZ,
Chief Engineer and Manager.
ALASKA NORTHERN RAILWAY CO.

Alameda Calif July 30th 1913
Aug 2 Rec.
Aug 5 Ans.

Dear Mr Patrick.

As you see I am back home once more. Stopping in Seattle for a few days I had a long conference with Mr Haight "in re Ballaine."

We went over the whole ground "ab initio." I showed him copy of my letter to Senator Chamberlain and referred to my recent conference with Judge Morford.

Mr Haight gave it as his opinion—specially on account of the $4000 payment to Lowells out of the company funds—that the Railway had a very good claim on the Seward townsite—that the socalled Frost settlement—giving Laberee and the old directors a bunch of lots without equivalent—constituted a fraud and would be declared null and void by any Court, etc. Now what are you all going to do about it? I note in press dispatches mention of some speech by Mr. Boland before the House Comittee.

Please supply me with copy.

It is very likely that I shall meet and have a long conference with Secretary Lane when he reaches Nevada or California in his itinerary. He sent me a personal request to that effect through the

Sargent of the geological survey. He is desirous to have my opinion on the value of the A. N. railway. I have written to the Jemmett for instruction in that matter and advised Mr. J. of my recent conference with Secretary Daniels in S. F.—You may consider it as an *absolute* certainty that it will be *Watnooska* not Behring river coal for the Navy. I have *positive* information and reasons to that effect.

Please note that *Derick Lane* is now in temporary charge of our property interests in Seward and any urgent information you may require by cable, please wire to him as he had my instructions to promptly attend to such matters in my absence.

Lane is an old friend of mine—an able accountant —son of a prominent old banking family of Troy, N. Y. formerly in the real estate and banking business in N. Y. and now president and owner of various well paying quartz mines in the Kenai peninsula.

All our affairs in Alaska I left in good shape and the road and wharf in fairly servicable and at least safe condition.

Trusting to hear from you at an early date stating present shape of matters in Washington etc I remain

Sincerely Yours

A. W. SWANITZ.

Exhibit No. 5 to Deposition of George H. Patrick—Letter, August 17, 1913, Swanitz to Patrick.

A. W. SWANITZ,
Consulting Engineer,
853 Laurel Street.

Alameda, Calif. Aug 17th 1913
Aug 22 Rec.
Aug 26 Ans.

My dear Mr Patrick.

In my recent letter of reply to you "in re Ballaine" and evidence needed for a proper suit to recover the townsite I forgot to mention that I have a number of old documents for example

1st *original* contract and minutes of Directors meeting under the company's sign and seal accepting Shedds proposal to furnish $200000 and conditions thereof and Ballaines additional townsite security.

2nd letter from Frank Ballaine, John E's brother and partner stating emphatically—without my request—that I and not Jno E. Ballaine financed the deal to build the first division.

3d letter unsolicited from Doctor Will. Ballaine, now a well known physician of Bellingham Wash. and former partner of Jno Ballaine stating the same and denouncing Jno. E. Ballaine as a hot air fraud and swindler.

4th letter from Shedd Bros stating the same and

5th numerous other old contracts and letters. All of which will be produced at the proper time.

Yours truly,
A. W. SWANITZ.

Exhibit No. 6 to Deposition of George H. Patrick—Letter, January 13, 1914, Swanitz to Patrick.

Telephone Alameda 2314.

Cable Address
"Swanitz," Alameda, Calif.

ALASKA NORTHERN RAILWAY CO.
A. W. SWANITZ
Chief Engineer

Alameda, Calif.
853 Laurel St. Jan. 15th 1914.
Feb. 5, Ans.

My dear Mr. Patrick.

Your letters of January 7th received with thanks and hope you will send me Congressional record numbers giving account of the pending controversy, also get Scott Farris to send me a copy of the "Congressional directory."

It seems you are the only friend the company has still keeping up a good fight. Under our Trustee Bolands instruction that the company does not wish to interfere in Washington unless for extension of its defunct franchises, I, as employee, had to cease my pernicious activities "pronto" and all my documents (including testimony that our friend Ballaine does not own the townsite except through courtesy and larchese of the Company) and correspondence are now neatly put away, labeled the different packages as "a Fools errand" "thankless efforts" "requiescat in pace" etc etc

I note what you say in re McPherson and Alaska Bureau. If you refer to my correspondence with

Maurice Leekey of Seattle of which you have copies —you will find his statement as to amounts paid by Guggenheims for support of the Alaska Bureau and the Alaska Junket—Leekey is a director of the "Bureau." Incidentally you might ask McPherson how many solid gold match safes he has brought with him to Washington like the one his bureau presented tc Set Mann (See my letters) and if he has his seat ticket for the Government "pap trough." I certainly would do so but then I am big enough to play with that skunk safely.

Yours truly,

A. W. SWANITZ.

Exhibit No. 7 to Deposition of George H. Patrick—Letter, February 11, 1914, Swanitz to Patrick.

Telephone Alameda 2314

Cable Address
"Swanitz," Alameda, Calif.

ALASKA NORTHERN RAILWAY
A. W. SWANITZ
Chief Engineer

Alameda, Calif.,
853 Laurel St. Feb. 11th 1914.
Feb 16 Rec.
Feb 16 Ans.

My dear Mr Patrick

Yours of Febr. 5th in re Seward Ballaine Townsite matter duly received.

Once before I wrote to you in full stating among other items that the $4000 paid to Lowells for the

townsite, to get them to relinquish their homestead rights—had been paid to my positive knowledge out of R. R. fund—that E. R. Keeler former Treasurer —whose address I gave you—would certainly swear to it as he had paid this money out of his funds by Ballaines order.

Accidentally I found among my old papers Mr. Keelers original letter press copy book and in it the letter copy of which I enclose which refers to the $4000 paid by him as Treasurer of the Company. This book in my possession will be mailed to Stavert only at his personal request as President. Of course there was at that time no Alaska Central money. All transactions were, and all funds furnished to R. R. Co. by Shedds, in the name of the Tanana Construction Co owning and constructing the said Railway for all its bonds and stocks. But this $4000 was paid to Lowells against my protest at the time because I did not want it paid for and charged to construction expenses which nevertheless was done against my objections. There is no earthly possibility of Ballaine being able to perjure himself out of that transaction.

You say you want me to send you all evidence. I decline to do so. 1st because the Stavert and Jemmett have never even had the courtesy to reply to my letters in this matter—neither had the Boland and therefore it would appear that they do not wish John E. Ballaine disturbed in possession.

2nd because one hours personal talk with you or whosoever would have this legal matter in hand would lead quicker to the point and essence of evi-

dence needed than many days work useless guessing and writing on my part as to evidence desired.

I have made plain statements—discussed the case with Morford and Haight and hence KNOW that we have ample evidence by living witnesses to prove that Ballaines ownership can be successfully disputed in Court, but if Strauss Stavert, Boland and Jemmett don't wish to save this most valuable asset for their clients why should I?

Respectfully yours,

A. W. SWANITZ.

"Copy"

Seward Sept 25th 1904.

Mr. Jno. E. Ballaine
Presdt.

Dear Sir.

Your favor of Sept 6th received.

I find that checks issued to date (not including the one for $15000) have overdrawn our bank accounts (including $4000 due on Lowell note) about $2000 and we have $18000 on hand here. This latter amount will provide for Oct 10th payroll and I will defer issuing any more checks as long as possible.

Mr. C. B. Shedd has kept me informed of all Chicago money transactions and I have made the necessary entries.

Yours very truly

(Sgd.) E. K. KEELER.

Mr. Keeler was Treasurer of all R. R. funds. Jno. E. Ballaine President—Frank Ballaine V. P. and myself Chief Eng. There was only one account for all expenditures and funds on hand.

Exhibit No. 8 to Deposition of George H. Patrick—Letter, February 14, 1914, Swanitz to Patrick.

Telephone Alameda 2314.

Cable Address
"Swanitz," Alameda, Calif.

ALASKA NORTHERN RAILWAY CO.
A. W. SWANITZ
Chief Engineer
Alameda, Calif., 853 Laurel St.

Febr. 14, 1914.
Feb. 18 Rec.
Feb. 18 Ans.

Dear Mr Patrick

Referring once more to the "Seward Townsite case." One of my neighbors here is a Mr Thos. West. Formerly from Toronto, Canada (He knows Mr Boland) he has practiced law in San Francisco for the last ten years—has a large and extremely profitable clientage from Alaska, Arizona etc. and been very successful in all his cases before the U. S. Court of Appeals etc. For my own information I have discussed this Jno Ballaine townsite matter thoroughly with my friend West and at my request he spent all day yesterday looking over a trunkfull of all my letters and documents relating to the former Alaska Central Railway, the Tanana Construction Company, Seward Const Co. and all letters telegrams contracts with Shedds etc. in the years 1903, 1904 and 1905.

His final verdict was "Of course the Townsite belongs to the Alaska Central Railway and not to Bal-

laine who clearly layd himself liable to a verdict of proven fraud."

I mention this for your own information.

Sincerely yours,

A. W. SWANITZ.

Exhibit No. 9 to Deposition of George H. Patrick—Letter, September 10, 1914, Swanitz to Patrick.

Telephone Alameda 2314.

Cable Address
"Swanitz," Alameda, Calif.

ALASKA NORTHERN RAILWAY CO.
A. W. SWANITZ
Chief Engineer
Alameda, Calif., 853 Laurel St.

Sept. 10th 1914.

Sep 15 Rec.
Sep 15 Ans. to Bicknell
Sep 17 Ans.

My dear Mr Patrick.

Yours of Sept 2nd received.

I have at no time refused any data in re townsite. They are now and always have been at the Co.s service. I have stated to you that I have Mr. Keelers original letter press copy book in which his letter to Ballaine dated Sept. 25th 1904 mentions the payment of $4000 a/c Lowell note. I have given you Mr. Keelers address. I have stated that I have no end of letters, data etc from which to refresh my memory of all these transactions. You only, and no one else, has ever asked me a question or intimated

that action might be taken against Ballaine to recover the townsite. I am no lawyer and don't claim to know and cannot guess what proofs, evidence statements de jure or in facto would be required. All I do know is that Ballaine had no money of his own—was deadbroke according to his own statement to me when we landed in Seward August 28, 1903, that he co*me*nced to sell contracts for lots August 29, 1903. How he covered up his transactions in scrip—his $4000 payment to Mrs. Lowell out of Company funds I am unable to say and is not in my province. Perhaps X Senator Turner and O. G. Laberee have correct knowledge as Ballaine's act in deeding them each 80 perfectly good lots in Seward free of charge, was scarcely a matter of spontaneous generosity.

I have told you that on my own account—to make sure of my statements to you—I presented all my evidence to Thos. C. West—formerly of Toronto Canada and now considered one of the leading attorneys on the Pacific Coast—handling successfully several great Alaska cases. He told me that we certainly had a sure case.

What else did you expect me to do? Force myself on Mr. Stavert who has not written me but one very short note in a year? and quietly ignored me?

Knowing the intimate relations between our Judge Morford and Mr. Haight with Ballaines I did not feel warranted to disclose all I knew to them but Mr. Haight, for whose honesty I always gladly vouch, told me we had a good case and would recover when I told him of my proof in writing that Mrs. Lowell

had been paid by Mr. Keeler out of the Company's funds.

Mr. Boland, Stavert or Jemmett have at no time hinted to me that my assistance, service or evidence in re Ballaine were desired or called for.

Therefore, please, amend your views and do not repeat that it were my fault if no suit is brought as "*good* lawyers will hesitate to involve their clients." . . . .

Good lawyers, in my opinion, should have, in fact, gotten busy long ago to protect the Company's interests by active work and at least asked me or Mr. Keeler such plain leading questions as would have determined legal facts and action.

I am now and always have been ready to do my part in the company's interests even if Otto Hansen wonderingly exclaimed to my Seward friends when he heard I was there this spring "Why? I am astonished! what is Swanitz doing here?" They told me in Toronto and Chicago (Frost) the Company was through with him!"

Sincerely Yours

A. W. SWANITZ.

Exhibit No. 10 to Deposition of George H. Patrick—Letter, November 3, 1914, Swanitz to Patrick.

Cable Address "Swanitz," Alameda, California.

A. W. SWANITZ
Consulting Engineer
853 Laurel Street
Alameda, Calif. Nov. 3d 1914.

Nov. 8 Rec.
Nov. 9 Ans.

"Personal"

My dear Mr Patrick.

I have your various letters and copies of letters received this day. In return I enclose copies of two letters I sent to Mr. Boland yesterday. They will explain to you a lot of things and the letter in re Laberee "will throw a beautiful search light into the ———'s camp. I did not mention to Mr Boland that Laberee told me "NOTHING" would be done in the Ballaine townsite case—that he had Mr Becknells positive assurance to that effect. It does look as if you and I had been and were wasting a good deal of ammunition. From Doctor Wm. Ballaine's statement to me in Seattle I thought we had a "cinch." Evidently we had the wrong pig by the ear and the "higher ups" don't care for any light on the subject. It's all such an awful disgusting mess that I am utterly sick of soiling my hands with it and were it not for the fact that I first want to see you—Haight and Morford paid—along with my own dues, I should not waste another postage stamp on the outfit.

Laberee bluntly admitted to me that he had "Inside" help in soaking the bondholders for the 1/10 Interest and its resultant settlement—You strongly believe in the Staverts good intentions. So do I. His whole appearance and personality is against any other assumption. But! is it not his business to protect the Company against graft and grafters? I have no objection at all to you mailing a copy of this correspondence to Mr. Stavert to England but to him ONLY.

Now regarding your very just claim.

In the first place! Last March our cash resources in Seward had dwindled down to about $150. with an average monthly expense for labor maintenance and supplies of $560. We had to borrow, on our personal security about $2000 from the bank, every time a steamer arrived, to meet the customary prepayment of all freight bills. I asked for funds time and time and time again by letter and wire. Mr. Stavert ignored me in toto. Jemmett only wrote he had or would resign. Mr. Boland had no answer, even when I wrote and wired that the Seward office could not meet any further the $315 per month to Messrs Haight, Patrick, Morford and Seattle office rent. It was a disgraceful situation to leave me in, till I finally took matters in my own hand and, ignoring the Toronto office, borrowed enough funds from friends to take me to Seattle and Seward to personally meet the situation. Mr. Otto Hansen, Mr. Clarkson's and Frosts friend arrived and was astonished to find me in charge—"Why" they told me in Toronto that they were going to send a new man—Mr. Kyle—in

place of Swanitz!" T'was funny—but Swanitz was there—attended to the Company's affairs and advised Kyle not *too* make too big a jackass of himself. In the meantime I carefully nursed our receipts and expenditures—till I finally now have something like $3600 cash on hand in Seward which Tozier has my strict orders to pay ONLY on my order. I have to retain $2000 in Seward for wharf business. The cost of appeal and sundry legal expenses will be $400. The remainder—after paying local payroll etc I mean to distribute this month to you—Haight Morford and myself in equal shares as per my letter to Boland.

Sincerely Yours,
A. W. SWANITZ.

Exhibit No. 11 to Deposition of George H. Patrick—Letter, September 12, 1914, Patrick to Bicknell, Bain, Macdonell & Gordon.

GEO. H. PATRICK
Attorney and Counselor at Law
514 Southern Building
Washington, D. C.

Subject. Seward Townsite.
Answer to September 9.

Washington, D. C.,
September 12,
Nineteen Fourteen.

Dear Sirs:

I have, as doubtless you would surmise, only hearsay knowledge of the Seward Townsite transaction;

but I have saved all the information coming to me, and Col. Swanitz always has given me to understand that he had preserved sundry documentary evidence, in addition to his personal knowledge of payments and entries, sufficient to establish the trusteeship, some of the documents perhaps acquired after he assumed control. I never have known the character or extent of his proofs; but he told me that he submitted them to two good lawyers, whom he named, and was advised they would sustain action. He told me that he knew of his own knowledge that the $4000 was taken from the Company's funds, paid to Mrs. Lowell, charged against construction account; and that he protested. This latter would have been natural, from his well known economies in construction and jealousy of unnecessary addition to his estimates, particularly without his initiation. As heretofore mentioned, he refused to let me have these papers, or the legend, when I asked for them to determine for myself their legal value. He wished to bring them east and first be assured they would be used in proper litigation, and not to advise Ballaine so that he could mend his fences. Most of my information via Swanitz is in correspondence.

Sundry Journals, Ledgers, etc., of the Alaska Central Railway and Tanana Construction companies, covering the period August, 1903 to October, 1905, are in my hands. They were sent to me as these company's books; but there should be more somewhere. I have no day-books, or blotters, the books of original entry, and presume they are in Seward,

if anywhere. I understand that Mr. Haight (Secretary) has the minutes and similar books, in Seattle.

I find one $4000 entry in Journals and Ledgers of both companies, bearing suspicious earmarks. It purports to be dated October 11, 1904, some four months after the due date of the 9 months note given Mrs. Lowell on September 3d, 1903, and to be a cheque on the Washington Trust Company, a Seattle institution, I assume. It is charged to construction account. So far, the variance in date being explained by delay in payment, the item seems to bear out Col. Swanitz' allegation. On one page of the journal are entered all of the cheques upon the Trust Company, numbered consecutively, for the month of October. Cheques were issued on 7th, 11th, and 12th, numbered 8, 9, 10, 11; but the above $4000 cheque is entered after the last number (17) and last date (25th), with the date of this cheque (11) in different ink from the credit "Tanana Constn. Co." to the Trust Company, and the number is "0," with a check-mark and small *c* both in red ink immediately before the figures 4000. The 0 seems to have a . in the centre. The bank-books might throw some light upon it; but I would not expect to find Mrs. Lowell's signature on the cheque, nor anything by which she could be connected with the transaction, unless the parties were careless beyond any kind of prudence. Naturally, evidence *dehors* the record would be required to show that the proceeds of this cheque went to Mrs. Lowell. On October 11 is a cheque to John E. Ballaine. I am going carefully over the books to trace the expenditure and balancing of this cheque,

and will try to give you the result by early next week's mail. It is unfortunate that the books of original entry are missing; but I am writing Superintendent Tozier to search for them and to let me know what are in Seward.

The Company dealt somewhat in scrip in those days, but none of the entries on the books I have could have covered the townsite. $6040, (920 acres) is charged in September, 1905, of which $1970 (320 acres) is undisposed of, unless used in some way, the remainder appearing as re-sold by Frost & Co. Probably the stock money was taken during the Shedd financing. Col. Swanitz was then with the Company, looking after the Shedd interests, as I understand; therefore in position to know at first hand what was going on. Frost & Co. took up all the original indebtedness, unless the stocks and bonds held by Shedd Brothers, and their friends, represent part of the payment.

I have lately written Col. Swanitz a strong letter on the subject of the townsite, and hope it may produce results. He usually becomes penitential after one of these.

Respecting the extent of the Ballaines' present holdings, the latest date I seem to have is the Seward Gateway tax sale advertisement of December 3, 1913, wherein Jno. E. Ballaine's lots filled three columns, several hundred in number. He was then trying to borrow money. I think he approached Messrs. Boland, Stavert and Jemmett, amongst others, to borrow $25,000 on the Seward security; and he must have obtained some money about that time, from some one. He either paid his taxes or the lots were

bought in by the town. I have lately heard, although not from Seward, that Ballaine was making frantic efforts to take advantage of this year's extraordinary boom, and had made some sales; but, as I also heard that he had refused $5,000 for choice lots, I think the purchasers may have acquired only an equity. Some three or four months ago I was told that not one vacant building was to be found in Seward. I think it may be assumed that the Ballaines yet hold a very large portion of the town, and deferred payments amounting to a considerable sum. We could not expect to recover from innocent purchasers for value; and, given a straight tip that we propose to sue, doubtless transfers covering all their holdings would be made between two days by both Ballaines.

I will get the information about their present holdings, somehow; but I hesitate to write to anyone in Seward because uncertain how confidentially my inquiries may be treated. Superintendent Tozier probably would be discreet, and Judge Morford would try to be; but I assume that Ballaine is in and out of the latter's office, and would be apt to note any letter from me, probably would not scruple to open if he could with safety. The matter is rather complicated by wheels within wheels, and nearly every one likely to kick at any time has been given lots. Ballaine has boasted of the (want of) consideration for many lots so conveyed, to shut the mouths of some of his associates. The lowest price at which I have ever seen any lot quoted, this in the years before any boom, is $200; and they have graded up to four and even five figures.

The Company's books (Alaska Central) were taken to Chicago to be used in the Frost trials. All were supposed to be there. Only a few have been sent to me. Whether all or only part of those taken to Chicago, I do not know. What I have were to show the cost of the road. They were shipped by Mr. Laberee, upon Mr. Boland's order, but I do not know the precise directions. I assume just generally the books evidencing the construction cost, but they are insufficient for that purpose; although convincing as far as they go. I expect to have a tolerably complete statement of the actual cost by the time the Engineer Commission returns here, fortunately, having a good deal of data outside the books above referred to. That does not bear upon Seward, however.

I am sending carbons of this letter to Messrs. Stavert and Boland, and you might get with the latter and conclude where some more books ought to be. He may know whether I have all or only part of the books that went to Chicago; and I am writing Mr. Laberee (copy enclosed), to know if he has any others under his control. For various reasons all the books of the two companies ought to be—somewhere.

Very truly yours,
GEO. H. PATRICK.

Messrs. Bicknell, Bain, Macdonell & Gordon,
Barristers and Solicitors,
Lumsden Building,
Toronto, Ontario, Canada.

Carbons to Stavert and Boland.

Exhibit No. 12 to Deposition of George H. Patrick—Letter, September 15, 1914, Patrick to Bicknell, Bain, Macdonell & Gordon.

GEO. H. PATRICK,
Attorney and Counselor at Law,
514 Southern Building,
Washington, D. C.

Subject. Seward Townsite.
Answer to September 9.

Sent WJB Apr 21 1915.

Washington, D. C.,
September 15,
Nineteen Fourteen.

Dear Sirs:

Under date September 10, received this morning, Col. Swanitz writes:

"I have Mr. Keeler's original letter-press copy-book, in which his letter to Ballaine, dated *Sept. 25th, 1904,* mentions the payment of $4000 a/c Lowell note.

I have given you Mr. Keeler's address. I have stated that I have no end of letters, data, etc., from which to refresh my memory of all these transactions. * * * I know that Ballaine had no money of his own, was dead-broke according to his own statement to me when *we* landed in Seward, August 28, 1903, that he commenced to sell contracts for lots August 29, 1903. * * * I have told you that, on my own account, to make sure of my statements to you, I presented all my evidence to Thos. C. West, formerly of Toronto, Canada, and now considered one of the leading attorneys on the Pacific Coast,

handling successfully several great Alaska cases. He told me that we certainly had a sure case.

Note. West is Republican candidate for State Senator in 14th California District.

> "Knowing the intimate relations between our Judge Morford and Mr. Haight with Ballaine, I did not feel warranted to disclose all I knew to them, but Mr. Haight, for whose honesty I always gladly vouch, told me we had a good case, and would recover, when I told him of my proof in writing that Mrs. Lowell had been paid by Mr. Keeler out of the Company's funds."

I do not recall that I ever have been advised of Mr. Keeler's address, but that is readily supplied, as Swanitz has it. His full name, according to the account-books, is E. R. Keeler. The date of payment fairly corresponds with the entry of $4,000 on October 11th, as items bearing date in August and September appear following that entry. Swanitz's statement of the first selling of lots by John E. Ballaine precisely confirms the letter of C. O. Lambert, at page 14, Case 56, of the record sent you last week. I do not know Keeler's position with the Company, and, so far, my examination of the books does not disclose it. If the Company's book-keepers were experts, it is a queer set of books they kept. If they were not professional accountants they succeeded in mixing up things in a way few skilled men could have done. I doubt if any one could correctly interpret the books without knowing something more of the relation of one thing with another than any of us know. I assume you are aware that the Tanana Railway

Construction Company was organized to become the Credit Mobilier of the Railway Company, to subtract a certain percentage, apparently, of the Railway moneys, under color of—business; and whether I am going through the books of the Construction or Railway company I am not at all sure. I should say the latter without qualification but for the fact that they are rubber-stamped in various places "Construction Company"; and the several accounts, or some of them, appear to be drawn off in the trial balances as "Railway Company." Then again, I find two journals, covering almost the same periods and the same items, with an occasional exception. I have an indistinct impression that Mr. Jemmett went over the books at Seattle, or Seward; and he may know the whereabouts of Mr. Winter, who was book-keeper, auditor, or expert accountant auditing the books. After I shall send on my excerpts you would do well to go over them, and my comments, with Mr. Jemmett. It is evident that we shall need the blotters, and all other memorandum-books in existence, as well as a *careful* examination of all the minutes, etc., now or heretofore in Mr. Haight's hands, as Secretary. Swanitz mentions the conveyance, without payment, of some 80 lots each to Mr. Laberee and Senator Turner; but the latter rendered considerable professional services, and was also a stock-holder.

I think I have some company audits, and will go over them before concluding what the books show and were intended to show, whereby the result may be delayed a little. I never have seen just such a set of books; and if the company book-keepers were ex-

perts, it is all the more puzzling. October, November and December are as apt to be followed as preceded by August and September, and dates and serial numbers are all mixed up. Apparently the railway and construction companies checked, bought, sold, expended, etc., interchangeably, while credits to the Washington Trust Company and the Washington National Bank appear in the same columns, and so on. Then, a book has the elements of cash, journal, ledger and memorandum, yet, purports to be but one of these, with a doubt as to the company to which belonging. Two or three series of check-books appear to have been running concurrently, chacks of the same day, entered on consecutive lines, being numbered 100, 500, 1500; and both companies cheques are posted in the same ledger account—this, if two sets of accounts were kept, and I have both, something I am trying to ascertain, without hinting my object.

Very truly yours,

GEO. H. PATRICK.

Messrs. Bicknell, Bain, Macdonell & Gordon,
Barristers and Solicitors,
Lumsden Building,
Toronto, Ontario, Canada.

Enclosures.

Exhibit No. 13 to Deposition of George H. Patrick—Letter, September 16, 1914, Patrick to Bicknell Bain, Macdonell & Gordon.

GEO. H. PATRICK,
Attorney and Counsellor at Law,
514 Southern Building,
Washington, D. C.

Subject. Seward Townsite.
Answer to September 9.

Washington, D. C.,
September 16,
Nineteen Fourteen.

Dear Sirs:

Herewith find copies of the following correspondence, re the Seward Townsite, some of which, by reason of its having been with Col. Swanitz' general file, instead of with the Townsite, I had allowed myself to forget in some details:

1. Sep. 25, 1904. E. R. Keeler, Treasr., to John E. Ballaine, reporting payment to Lowells of $4000.
2. Jun. 2, 1913. Swanitz to Senator Chamberlain.
3. Jul. 3, 1913. Swanitz to Patrick.
4. Jul. 30, 1913. Swanitz to Patrick.
5. Jul. 30, 1913. Swanitz to Patrick.
6. Aug. 17, 1913. Swanitz to Patrick.
7. Feb. 11, 1914. Swanitz to Patrick.

Vide extracts from Swanitz' Sep. 10, 1914, letter to Patrick, quoted in my letter of September 15, confirming statements in enclosures.

Treasurer Keeler's letter creates a belief that the $4000 to Mrs. Lowell was either paid, or covered up, in the October 11th, 1904, $4000 cheque, which may not have been issued at its date, on account of the overdrawn account, or may have been dated considerably later than its issue. It is evident that the date appearing in the journal entry is no proof that it was issued on that day, indeed, the fair presumption is that it was some sort of an afterthought, the number being 0, and the date being filled in the regular order. I would expect the payment to have been in cash, of which $18,000 seems to have been on hand at Seward, or, the cheque to have been cashed in Seward. Some one of the witnesses to the transaction, all yet living, apparently, must know all about this.

The enclosures set forth somewhat more detailed statement of the townsite transaction than you have, and the conveyances by Ballaine to Shedds' trustee, and back again, if in the name of John E. Ballaine, furnish food for thought and—litigation. Neither Ballaine then had any real title to convey; but any assertion of ownership by John E. Ballaine during this period, 1903–1904, may be pertinent, also embarrassing, sometime.

Very truly yours,
GEO. H. PATRICK.

7 Encl.

Messrs. Bicknell, Bain, Macdonell & Gordon,
Barristers and Solicitors,
Lumsden Building,
Toronto, Ontario, Canada.

CLERK'S NOTE.—Pursuant to stipulation of counsel for the respective parties, filed December 1, 1919, as appears at page 120 of Record herein, the inclosures referred to in said letter are omitted as a part of said exhibit, for the reason that they are copies of exhibits already printed herein, viz.: Exhibits Nos. 1, 2, 3, 4, 5 and 7 to Deposition of George H. Patrick.

Exhibit No. 14 to Deposition of George H. Patrick—Letter, December 5, 1914, Patrick to Stavert.

GEO. H. PATRICK,
Attorney and Counsellor at Law,
514 Southern Building,
Washington, D. C.

Seward Townsite.

COPY FOR INFORMATION.

December 5, 1914.

Dear Mr. Stavert:

It would fairly have been my duty, under the most ordinary terms of professional employment, to advise you of anything coming to my knowledge that might seriously affect either the Company's or your own interest; but my original employment was almost wholly for this purpose. A good many extra calls have been made upon me, growing out of the connection, some of which have entailed expense, that is another story; but, I believe what came to me, without inquiry or suggestion of mine, was required to be communicated, and sometimes, I have thought I ought to tell you, as I have told, my opinion thereon. The following came to me, in such manner as to compel belief.

1. That John E. Ballaine bought the scrip with which the Seward Townsite (Survey 726) was located with $3000 derived from the sale of stock belonging to the Alaska-Central Railway Company, the money also being company money.

2. That $4000 paid Mrs. Mary Lowell, for her prior rights, which she relinquished for such consideration, had been taken from the above company's Seward funds and charged against construction.

3. That the land entry, as subsequently developed, was in the name of Frank L. Ballaine, a brother, then in partnership with John E.; but that John E. always claimed and asserted ownership and control everywhere except in the United States Land and Recorder's offices. That the whole transaction, so far as the Ballaines were concerned, was in fraud of the United States and the Company.

4. That John E. Ballaine mortgaged the whole of the Survey 726 to Shedd Brothers, perior to patent, receiving back a release after Frost bought in and took over Shedds' claims; that he gave and sold lots to many persons, and since has held large numbers of lots in his own name.

5. That John E. Ballaine was Secretary, managing director and controller of the Alaska Central Railway, and President, controlling stockholder, and manager of the Tanana Construction Company, which built the first section of road, occupying a fiduciary relation towards both and all, of which he was in absolute control in Alaska.

6. That false entries were made in the books to cover up these transactions.

7. That John E. Ballaine had boasted with such circumstantial and persistent repetition as to produce general belief in Seward, and considerable elsewhere, that he had purchased absolution and protection from responsibility from *all* the corporations concerned.

On this state of facts I advised and urged that you should take the opinion of your own, perhaps also the counsel of the owners, who happened to be the same person, although I did not then know it, as to whether Ballaine should be held to account as Trustee for the Alaska Central Railway Company, all whose property and rights had come to the Alaska-Northern, at the same time expressing my own view that recovery seemed to be undoubted, in the absence of some defense I could not surmise. I was particular to caution against any publicity that should notify Ballaine so that he might transfer his title, or otherwise complicate proceedings. Messrs. Haight and Morford, formerly, perhaps yet Ballaine's lawyers, Mr. Frost, Mr. Labaree, Col. Swanitz, Mr. Keeler, former bookkeeper and cashier, or treasurer, who paid the $4000 to Mrs. Lowell, probably others, have been corresponded with, and all of them have made statements, generally hearsay, except Keeler. Ballaine knows everything discovered, at least in a general way, and that the question of legal proceedings against him is under consideration. He has not been informed through me, directly or indirectly. That is not my affair; I have had to do only with passing along such information as came to me, more or less annotated.

Mr. Haight interviewed Mr. Keeler, in Mr. Frost's Chicago office, whence he proceeded to Toronto; and Mr. Frost wrote a somewhat circumstantial letter to Mr. Boland. Their accounts, which are supplemented by letters from Haight and Morford, and by Mr. Haight's verbal statement, as to the $4,000 are:

Keeler represented to Shedds, who advanced all the first construction money, to see to proper disbursements on the order of Swanitz, Shedds' selected engineer.

Keeler says:

> That Frank Ballaine told him about some claim as he was sailing for Seattle. That this $4,000 Lowell note, accompanied by documents, was presented to him next day as such claim, and appeared to be a lien upon *upon* mortgaged Seward; that he wired Swanitz out on the line, and Swanitz said pay it, he paid the note, took an assignment of the papers to himself, advised *John E.* Ballaine, demanding repayment; charged same to himself, on the books, as trustee, opening an account therefor in his name as trustee, which was balanced by a subsequent repayment by John E. Ballaine, in the shape of a credit at the Seattle bank.

Contra:

> Swanitz says he did not advise this payment, and that Frank Ballaine was in Seward when the $4,000 was paid, as is shown by his books and as at least two reputable persons who know will testify. We have Keeler's letter and the books. The letter contains no reference to re-

> payment; indeed, its tone is quite the contrary. No such charge appears against Keeler, no such credit; no account is in his name on the books; no such payment appears in the account of the bank. The $4,000 cheque, which may have been cashed, as Keeler says he paid Mrs. Lowell in money, is charged against construction, and the ledger account is duly balanced without any Ballaine credit.

This is precisely as *we* have understood; but always has been some doubt whether proof could be made, at this late date, of the purchase of the scrip with company money. Messrs. Frost, Haight and Morford were of opinion that Ballaine bought this out of his very liberal 40% commission upon the stock he sold. The whole stock transaction was a fraud, *none of the receipts* from sales to innocent, usually small investors, over a wide area, having been used, or intended to be used for the construction of the road or other legitimate company purpose, only, to be divided among the promoters, so that Ballaine's 40% commissions, as much as the 60% over, were company money for any purpose connected with proposed litigation to restore title of Seward to its rightful owners.

It has been asserted, although not yet proven, that Ballaine put through, on the company's books of minute, some resolution by the directors, in substance, whitewashing his Seward transaction. I assume that this was in sufficient legal form to accomplish its intention, and was done. The answer is that the action of the stockholders was necessary,

after due notice, to divest legal or equitable title to real estate, particularly, when the act is practically a gift without any consideration. The books show a paid and balanced John E. Ballaine expense account of $28,000, with whose details no one is acquainted; and he drew a large salary $5,000 or $6,000 a year, with liberal expenses paid as incurred. Mr. Labaree once informed me that this $28,000 really was money owing by Ballaine, and represented amounts he had appropriated. Secretary Haight says he knew nothing of such expense account. I only know what appears on the books.

Quite recently, since I have written to you or Mr. Bicknell on this subject, I have been reliably informed that it is capable of positive proof by a witness having personal knowledge of the entire transaction, that the $3,000 paid for the scrip was taken from sales of company stock, not from John E. Ballaine's commissions, as well as the later $4,000 payment from the company funds, some year and more later.

I am informed that it can be satisfactorily established that John E. Ballaine was wholly without means before he began to exploit the Alaska Central stock-sales, and that he has since earned no money outside that company and its subsidiaries and the accretions of company assets, including property company money bought.

Ballaine has paid taxes, and it has been strongly urged that he would be entitled to credit therefor, enough to equal the value of the property remaining. Granted, for the sake of argument; so would he be

chargeable with the very much greater sums received from lots. The balance would probably be some hundreds of thousands of dollars against Ballaine, who also paid these same taxes out of money equitably belonging to the company; and it would be passing strange could money be so juggled that it could serve two masters at the same time, unless one were subordinate to the other.

CONCLUSION.

It is reasonable to assume that every defense Ballaine, his lawyers and friends can devise has been presented. I give you the substance of what has been submitted to influence my judgment, which, for some reason, it has been desired should be in harmony with others. Upon the whole case, he has no defense; the two, or three as the case may be, Ballaines can be held as trustees for the company, and a court of equity would vest legal title in the Alaska-Northern.

Mr. Boland has written several letters to me on the subject, submitting, I assume, all the information he has been able to dig up; Mr. Haight has interviewed persons connected with the different companies, and he came here, last Saturday, and we went carefully over the books together. I have sent the late Mr. Bicknell's firm a considerable volume of data. I have answered everything that has come to me from any one.

So much I am constrained to say at this time. I presume it will be my last communication on the subject. It is for you to do what you please with.

I have complete transcripts of the records of the

Land Office, showing location, surveys, etc., also a number of documents, plats, and memoranda. In a general way, Mr. Bicknell was informed, in his lifetime. I understood from Mr. Boland that Mr. Bicknell had reached the conclusion an action could be maintained, and ought to be brought; without saying so, such was the tone of his letters to me. I have been told that Mr. Labaree, a lot owner, who saw him shortly before his death, later than any of my own correspondence, stated out west that Mr. Bicknell told him no action would be brought. I have had no communication with Mr. Bicknell's successor as bank counsel; and I do not know who, if any one, now represents you.

Very truly yours,

GEO. H. PATRICK.

W. E. Stavert, Esq're,
President, Alaska-Northern Railway Company,
Tyrrell Building,
Toronto, Ontario, Canada.

Encl.

Suit for the recovery of Seward will be barred by the statute of limitations, January 13, 1915, or May 5, 1915, according to two possible constructions.

[Endorsed]: District Court of the U. S., Western District of Washington. J. E. Ballaine vs. W. J. Boland. Deposition of George H. Patrick, for Dfdts. Alexander H. Galt, Notary Public and Commissioner. Fee, $10.50.

[Endorsements on envelope containing Deposition of George H. Patrick]: Addressed to Frank L.

Crosby, Esq., Clerk of the District Court of the United States for the Western District of Washington, Seattle, Washington. From A. H. Galt, 436 Southern Bldg., Washington, D. C.

Filed in the U. S. District Court, Western District of Washington, Northern Division. March 20, 1917. Frank L. Crosby, Clerk. By Edw. Lakin, Deputy.

No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed December 5, 1919. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 1—Certified Copy of Opinion etc. Alaska Northern Ry. Co. vs. Alaska Central Ry. Co. et al.

Certificate of Clerk U. S. District Court to Opinion, etc.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, the undersigned clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the attached is a full, true and correct copy of the original Opinion, Findings of Fact, Conclusions of Law, and Judgment in cause No. 720, Alaska Northern Railway Company, Plaintiff, vs. Alaska Central Ry. Co., a Corp., Tanana Construction Co., a Corp., John E. Ballaine, Frank L. Ballaine et al., Defendants, and E. A. Shedd & C. B. Shedd, Intervenors, and J. H. Macklin and International

Assets, Ltd., Substituted Intervenors, as the same appears on file and of record in my office.

In testimony whereof I have subscribed my name and affixed the seal of the said court at Valdez, Alaska, this 13th day of November, 1915.

[Seal] ARTHUR LANG,
Clerk.
By K. L. Monahan,
Deputy.

In the District Court for the Territory of Alaska, Third Division.

No. 720.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation,
Plaintiff,

vs.

ALASKA CENTRAL RAILWAY COMPANY, a Corporation, TANANA CONSTRUCTION COMPANY, a Corporation, JOHN E. BALLAINE, FRANK L. BALLAINE et al.,
Defendants.

Opinion Alaska Northern Ry. Co. vs. Alaska Central Ry. Co. et al., No. 720, in District Court for the Territory of Alaska, Third Division.

This action was commenced on April 29, 1915, by the plaintiff, the Alaska Northern Railway Company, as successor in interest to the Alaska Central Railway Company, claiming to be the equitable owner of about 159 acres of land, known as the Townsite of Seward, which it alleges the defendants,

John E. Ballaine and Frank L. Ballaine, acquired in their own names, but in trust for the Alaska Central Railway Company.

The bill alleges that prior to the year 1905, defendant John E. Ballaine, being an officer of the Alaska Central Railway Company, procured for himself, but in the name of his brother, Frank L. Ballaine, title to the said land, diverting funds under his control belonging to the said Railway Company, to pay for the same, to wit: $3,000 to pay for soldiers' additional homestead scrip with which to patent said land, and $4,000, with which to secure the relinquishment of Mary Lowell, who at that time occupied and claimed said land as her homestead; in fraud of the rights of said Railway Company. That said land was patented in two tracts in the name of Frank L. Ballaine, one patent dated May 1, 1905, and the other May 20, 1905.

Defendants John E. and Frank L. Ballaine by their answers deny that said land was acquired by them in any other way than in their own right (John E. owning two-thirds and Frank L. one-third); deny all the claims of the plaintiff; allege that they paid all expenses for patenting said land, including cost of soldiers' additional homestead scrip and $4,000 paid Mary Lowell for a release of all her claims to said land out of their own funds. They also set up certain further defenses by way of estoppel, viz.—laches in bringing said action; that said Railway Company is not empowered under the law to take or hold any lands except for the actual and necessary requirements of its railway business; that no right

to said lands was ever claimed by the Alaska Central Railway Company and none transferred by the deed to the plaintiff company; and estoppels by the acts of the Railway Company in that deeds conveying certain portions of said land were made to and accepted by said Alaska Central Railway Company, by the Ballaines, and later transferred to the plaintiff, the Alaska Northern Railway Company.

It is a matter of grave doubt if one or more of these further defenses or pleas in bar would not be sufficient to defeat the plaintiff's cause of action.

On the question of laches: In Wood vs. Carpenter, 101 U. S. 135, the Court says:

> "In this class of cases the plaintiff is held to stringent rules of pleading and evidence, and especially must there be distinct averments as to the time when the fraud, mistake, concealment or misrepresentation was discovered, and what the discovery is, so that the Court may clearly see whether by ordinary diligence, the discovery might have been made before."

In this case nearly ten years elapsed before the claim was made that said land was not the rightful property of the Ballaines, and no reason or excuse whatever is offered why the claim was not sooner made; no diligence whatever is shown or any effort made to ascertain the facts, until, by reason of the Government of the United States taking over said railway property, the townsite of Seward acquired a speculative value which it had not had before in years.

On the question of the right of a railway company in Alaska to acquire and hold land, other than what is necessary for its actual needs for railway purposes,—the right is at least very doubtful.

There is no statutory authority given for such ownership, even though, as in this case, the articles of incorporation provide for the acquiring of townsites, as they provide for the acquiring of almost every kind of property and engaging in every kind of business known to the ingenuity of man in the preparation of such documents. The case of Case vs. Kelly, 133 U. S. 21, seems to be very much in point on this question, and it is there held that in the absence of statutory authority a railroad cannot lawfully take or hold land, other than what it actually requires for depot, terminal and station grounds, and that a trust similar to the one claimed by plaintiff in this case, although there clearly recognized, would not be enforced for said reason.

There is some doubt as to the defense that no conveyance or transfer was ever made to the Alaska Northern Railway Company expressly mentioning any right, title or claim of the Alaska Central Railway Company in or to said townsite.

There is also considerable doubt as to the effect of the acceptance of the deeds made by the Ballaines to the Alaska Central Railway Company of certain tracts and lots in said townsite.

It is always better and more satisfactory, however, that a case should be determined upon the merits where possible than to go off upon legal questions which may be open to much disputation. The latter

course may be more interesting to lawyers but not so satisfactory to clients.

A demurrer to plaintiff's complaint was overruled; likewise a motion for nonsuit at the close of plaintiff's testimony; both plaintiff and defendants have had the fullest opportunity to introduce every bit of evidence bearing upon the question involved, and while it is true that a great mass of evidence, oral and by deposition, by book and document, has been received in evidence, much of it is superfluous. From that evidence it is possible to determine satisfactorily the real truth of this controversy.

There is very little difference between the facts shown by the testimony of the plaintiff and defendants; there is a wide divergence of opinion between plaintiff and defendants as to the inferences and conclusions to be drawn from the facts.

It may be said at the outset, however, that the plaintiff has wholly failed to substantiate the allegations of its complaint to the effect that defendant John E. Ballaine or defendant Frank L. Ballaine ever diverted any funds at any time or in any sum whatever from the Alaska Central Railway Company, or the Tanana Construction Company, or ever had the funds of either company under their control. The undisputed testimony in the case shows that they paid all expenses of surveying and patenting the land in controversy, including the cost of soldiers additional homestead scrip (about $2,000) and the $4,000 paid Mary Lowell for her relinquishment, from their own funds.

The Alaska Central Railway Company was incorporated under the laws of the State of Washington, March 30, 1902, largely through the efforts of defendant John E. Ballaine, its object being to survey a route and if possible build a railway line from the southern coast of Alaska to the interior of the country, reaching the Tanana or Yukon River. The names of the trustees designated in the articles of incorporation were:

G. W. Dickinson,	Seattle, Wash.
E. E. Caine,	"
Charles L. Denny,	"
J. W. Godwin	"
John E. Ballaine,	"
George Turner,	Spokane, Wash.
Charles F. Peck,	Omaha, Neb.

John H. McGraw, of the State of Washington.

Neither Charles L. Denny (by reason of ill health) nor Charles F. Peck (for some other reason) ever qualified or served as trustees. Later F. Aug. Heinze and James A. Haight were selected to take the places of the said Denny and Peck.

A limited amount of money was raised and a survey party was sent to Alaska in 1902, which began surveying near the head of Resurrection Bay. The survey party was under the charge of C. M. Anderson, a civil engineer. Many locations of various kinds, mineral and nonmineral, were made or attempted to be made by this party, along the shores of Resurrection Bay, extending a distance of some ten or twelve miles along the shores and around the head of said Resurrection Bay.

At that time the land in controversy was occupied and claimed by one Mary Lowell, a Russian woman who had married an American and was living on said land with her family of children. A few nonmineral locations for railway terminal purposes appear to have been made adjoining the land claimed by Mrs. Lowell. All of these locations, while it does not clearly appear by whom they were made, were presumably made under the authority of the engineer, Anderson, but no location appears to have been legally initiated at that time or followed up by the acts necessary to divest the title from the United States, except as certain portions thereof may have later been surveyed and acquired as terminal grounds for the Alaska Central Railway Company.

A map introduced by plaintiff (being Exhibit #1 of Testimony of W. H. Whittlesey) shows that there were five wharf sites designated on said map, at various points around the head of Resurrection Bay.

In the spring and early summer of 1903 the funds of the Alaska Central Railway Company were at a very low ebb. It seems that John E. Ballaine and other members of the board of trustees had made strenuous efforts to raise money to finance said company, but the financial condition of the country was such that it was impossible to raise funds. At this time some of the trustees were ready to give up attempting to finance the company. Mr. Heinze had withdrawn, saying it was impossible to raise the money. John E. Ballaine seemed to be the only one with optimism enough to continue his efforts.

In the month of June or July, 1903 he called to the

attention of all the trustees of said Alaska Central Railway Company except Mr. Heinze, who had ceased to act, and Senator Turner, who was absent from the United States, the fact that land for a townsite should be located and title acquired from the United States on Resurrection Bay, from which said railroad was projected.

The undisputed testimony shows that the defendant John E. Ballaine desired the Railway Company to take up this townsite, then claimed by Mary Lowell, as part of the railway property. This the board of trustees declined to do, for two reasons: First, James A. Haight, one of the members of said board of trustees, who was an attorney-at- law, gave it as his opinion that it was very doubtful if the Railway Company could hold or acquire title to any lands except such as were actually necessary for the conduct of its business, to wit, depot, station and terminal grounds. The second reason was, that the said trustees felt that the taking up of said land was speculative and there were no funds with which to pay the expenses thereof. John E. Ballaine then asked if any of the board of trustees cared to go in with him or become interested in the location and patenting of said land for a townsite, and no one of said board of trustees desiring so to do, the said John E. Ballaine then announced that he would take it up himself, individually, and there was no objection made on the part of any of said board of trustees.

On August 1, 1903 John E. Ballaine sent his brother, Frank L. Ballaine, to Seward, Alaska, where he arrived about August 12th and immediately pro-

cured relinquishment from Mary Lowell to her homestead covering the land in controversy. Frank L. Ballaine then caused a survey to be made of the land and left for Sitka and Juneau where he made application in the Surveyor-General's office and the United States Land Office for official survey and patent for said land under soldiers additional homestead scrip, which John E. Ballaine on July 20, 1903 had procured from John M. Rankin of Washington, D. C., paying him $2,000 therefor out of his own funds.

On August 11, 1903, the Tanana Construction Company was organized under the laws of the State of Washington by Robert B. Evans, John Dowdle, A. W. Swanitz, John E. Ballaine and James A. Haight for the purpose of taking a contract from the Alaska Central Railway Company to build its railroad.

About August 20th John E. Ballaine, accompanied by Col. A. W. Swanitz, John Dowdle, Robert B. Evans, and others left Seattle for Resurrection Bay. They met Frank L. Ballaine at Juneau and he told his brother, John E., what he had done with regard to getting the relinquishment of Mary Lowell for said homestead. The said party arrived at Resurrection Bay on August 28th. On September 2, 1903 John E. Ballaine gave to said Mary Lowell a note for $4,000, payable nine months after date, without interest, signed by the Seward Townsite Company by John E. Ballaine, President.

Both John E. Ballaine and Frank L. Ballaine testified that at that time they were copartners in

said townsite and expected to carry it on under the name of the Seward Townsite Company.

Said Dowdle became dissatisfied with the situation and he, together with John E. Ballaine and Colonel Swanitz, left Seward about the 10th of September for Seattle.

The financial affairs of the company were again at a low ebb, when Colonel Swanitz succeeded in enlisting the aid of the Shedd Brothers of Chicago, who undertook to finance the Railway Company.

In the spring of 1904 Colonel Swanitz, as chief engineer, came out to Seward, together with one Elbridge R. Keeler, who was the treasurer of said Tanana Construction Company, and directly responsible to the Shedd Brothers. He paid out all of the moneys for the railroad work being done by the Tanana Construction Company and on June 2, 1904, the said Lowell note for $4,000 was presented to him and he was asked to pay the same. At that time John E. Ballaine was absent from Alaska and there was no bank in Seward and no cable or telegraph line running into Seward. Frank L. Ballaine at this time was also absent from Seward. Mr. Keeler told the holders of said Lowell note that said note must be paid by John E. Ballaine, that neither the Alaska Central Railway Company nor the Tanana Construction Company had anything to do with it. The one who presented the note, being some relative of Mrs. Lowell's, was very insistent that the note be paid. Mr. Keeler then told him that he would have to wait until Colonel Swanitz, who was the chief engineer and practically in charge of the enterprise in Alaska,

returned to Seward. A few days thereafter Colonel Swanitz returned and Mr. Keeler took the matter up with him. Colonel Swanitz a witness for plaintiff, testified that inasmuch as Frank L. Ballaine had given a deed to the said land and put it up as collateral security with the Shedds, as part of the security in consideration of which they had advanced the money to finance the railroad, that he considered it was protecting the Shedds to see that the note was paid. He therefore advised Keeler to pay it and Keeler did so, with funds in his hands belonging to the Tanana Construction Company, upon Colonel Swanitz O. K.-ing the voucher and Keeler charging the said $4,000 to himself as trustee. Upon Frank L. Ballaine's return a week or two later, he, at the request of Mr. Keeler, also O. K.-ed or approved the voucher paying said note. John E. Ballaine was advised of this action in paying said note and about three months later, he paid said sum of $4,000 out of his own funds, into the Washington Trust Company, to the credit of the Tanana Construction Company. Later the note given the Shedd Brothers, Chicago, by the Ballaines and others, to secure the money advanced by the Shedds to finance the railroad enterprise, was paid and the said deed for said townsite returned to Frank L. Ballaine.

There was a good deal of documentary evidence with reference to the dealings between Dowdle, Shedd Brothers, and later with one A. C. Frost, who afterwards became largely interested in said railway enterprise. This great mass of testimony does not tend to throw much light, if any, upon the contro-

versy. It does show that John E. Ballaine at all times took an active part in promoting the said Alaska Central Railway Company and its construction, and it is not an unfair inference that he, as the originator and promoter of such enterprise, not only had a pride and interest in its success, but also sought to protect his own interest in said townsite, as the success of the railway enterprise would necessarily mean the success of his venture and investment in said townsite.

The witness John Dowdle, on the part of the plaintiff, who is shown to have some personal feeling against John E. Ballaine, testified that before leaving Chicago in August, 1903, Colonel A. W. Swanitz being present, John E. Ballaine told said Dowdle that the Alaska Central Railway Company owned the townsite of Seward. This is positively denied by Mr. Ballaine and Colonel Swanitz, also a witness for plaintiff, testified that he never heard or heard of any such conversation, but that on the contrary John E. Ballaine at all times claimed he owned the said townsite.

Of the original trustees of said Alaska Central Railway Company Dickinson, Caine and McGraw are deceased. There is testimony showing that at different times they each received some ten lots from John E. Ballaine in said Seward townsite. Counsel for the plaintiff lays great stress upon this as evidence of fraud, arguing that their action was improperly influenced thereby. The undisputed testimony, however, of those present at said meeting, who are still living, to wit: J. W. Godwin, James A. Haight,

John E. Ballaine and Frank L. Ballaine, shows that this was not the case; that the trustees, acting for and on behalf of the corporation, did not feel justified in incurring the expense and in entering into what then seemed to be a more or less speculative and hazardous investment, and the doubt as to the legal right of the Railway Company to hold and own the townsite.

James A. Haight completely and satisfactorily accounts for the deeding to him of some few lots on account of services rendered by him in securing the patent to said land and performing other legal services.

The testimony of John E. Ballaine shows that at a time when he was endeavoring to finance the said railroad and finding great difficulty in selling the bonds thereof, he prevailed upon J. W. Godwin, E. E. Caine and Governor McGraw to purchase two bonds each at $850 for each thousand dollar bond and agreed to give them as a bonus ten lots each in the townsite of Seward. The undisputed testimony further shows that the said lots were in a rather remote portion of the town of Seward and had little or no value then except a purely speculative one, and have little or no value now except a purely speculative one.

There were some printed circulars or prospectuses introduced in evidence by plaintiff, some published as early as the summer of 1902, setting forth in glowing terms the wonderful resources of Alaska and the opportunity there was for a profitable investment. The first one of these prospectuses was issued probably in June, 1902, for the following is found near the end thereof:

"Supplemental—July 1, 1902. Since the publication of this prospectus, all five of the surveying parties to make the permanent survey for the Alaska Central Railway have been sent and are at work. They will finish before November 1. A sixth party, to begin cross sectioning, will be sent within a few days. The company will immediately proceed to locate a terminal townsite on Resurrection Bay, and other townsites along the route, all of them in the name of the company, the profits from which will accrue to the stockholders *pro rata.*"

There is no evidence of any wilful misrepresentation and it is not to be presumed that the men whose names appear on this prospectus were guilty of any intentional fraud or imposition. At that time it was no doubt the intention to acquire a townsite on Resurrection Bay. John E. Ballaine testifies so himself and that up to as late as July, 1903 he endeavored to have the Alaska Central Railway Company, through its duly authorized officers, take up said townsite, and in this he is fully corroborated by other witnesses and in no manner disputed. This statement, in the prospectus together with the Keeler voucher showing the payment of this $4,000 to Mrs. Lowell, no doubt was largely responsible in causing those who brought this action to believe that they could make out a case against the Ballaines.

Counsel for plaintiff is strenuous in his contention that a great wrong was perpetrated upon those who purchased stock in the Alaska Central Railway Company by reason of this statement in the prospectus.

Unfortunately, this is not the only statement in the prospectus which is somewhat exaggerated and overdrawn, but it is one of the unfortunate things about promotion enterprises that glittering promises and inducements are held out to those who might purchase stock. It may be that those who issue it believe in the truth of the statements, but it too often happens that such statements are not either conservative or strictly truthful, however much the enthusiasm of the promoters may lead them to believe it. In this case, however, the undisputed testimony shows that about the year 1905, one A. C. Frost came into control of the said enterprise; that he and his associates bought up all of the stock that had been sold which they could find and that nearly all those who had bought stock sold same back to Frost and his associates at a profit.

It is not claimed that Frost or any of his associates were ever deceived into believing that said townsite belonged to the Railway Company and no presumption to that effect can be indulged.

The Testimony shows that the Ballaines deeded to the Alaska Central Railway Company all necessary right of way through the townsite for railway purposes, also a tract of about seven acres for depot grounds and a number of lots for office and other building purposes. These deeds were accepted by the Alaska Central Railway Company and upon the transfer of all this property to the plaintiff, the Alaska Northern Railway Company, the latter company received and accepted the same.

The Alaska Central Railway Company, when it

filed its plats and profile of its official survey, located and acquired from the government certain tracts and riparian rights adjacent to the land in controversy.

Before the plaintiff could succeed in an action of this kind, it must sustain the allegations of its complaint by a clear and convincing proof. This it has wholly failed to do. It has completely failed in its allegation that the soldiers additional homestead scrip was paid for by funds other than those belonging to John E. Ballaine. The $4,000 was paid Mrs. Lowell on the responsibility of Mr. Keeler himself, as he testifies, not by request or procurement of John E. Ballaine or Frank L. Ballaine, and was repaid by John E. Ballaine. The plaintiff, however, still contends that the fiduciary relations of both John E. and Frank L. Ballaine to the Alaska Central Railway Company and the Tanana Construction Company were such that they could not acquire interests adverse to or prejudicial to the rights of the said company, assuming that the acquiring of said townsite was adverse to the Railway Company. While it is true that fraud will never be presumed, but must be proved by clear and unambiguous evidence, yet this rule is sometimes modified in cases where one holding a fiduciary relation takes advantage of such position to acquire benefits for himself, which ought in equity and good conscience belong to the person or corporation toward whom such fiduciary relationship exists, and the acts of such persons will be strutinized very closely before they will be permitted to acquire such interests.

I have considered this case, however, very carefully

and I am satisfied that there is nothing in the conduct of John E. Ballaine or Frank L. Ballaine in this case that savors in any manner of unfairness, deception or taking advantage of the Alaska Central Railway Company or the Tanana Construction Company, or acquiring property adverse to the interest of or prejudicial to said railway company. There is not a particle of proof that either John E. or Frank L. Ballaine were charged with the duty of locating or acquiring townsites or other lands for said railway company, and presumably its chief engineer, or locating engineers, were employed to perform such duties.

The said Railway Company, through the only officers through whom it could act, refused to take said townsite, although John E. Ballaine desired and requested them to do so. At that time, in addition to the lack of funds, they were aware that there was a legal doubt as to the right of the railway to hold land for speculative purposes, and if they were familiar with public land matters, they may have known that there were other difficulties and objections in seeking to acquire title to such lands. The history of such cases in Alaska has been that one seeking to acquire title to lands which are supposed to have some speculative value, has had to contend with jumpers and holdups and claims of many kinds; that their claims may be and often have been rejected by the government, and their application for patent be refused, and this after the expenditure of much time and money. It might well have been that had the Railway Company sought to take over and acquire title

to this land, that it would have been a matter of great loss and expense to the company. They may have had to contend with jumpers and squatters, lawsuits and protests filed against their application for patent, so they never could have acquired title. This is one of the risks that the Ballaines ran in undertaking to acquire title to this land. Furthermore, at the time that the Ballaines took up this land, the Railway Company might have acquired other land, a distance anywhere from a mile to ten miles therefrom, where dock sites had been mapped out and platted in 1902. One or more rival townsites might have sprung up and with the expenditure of money by the promoters, might have succeeded in causing the town to build elsewhere than where it did.

Counsel for the plaintiff is very earnest in his insistence that because there were no minutes kept of the meeting of the board of trustees at the time they talked over the matter of the townsite with John E. Ballaine in July, 1903, that it is evidence of a secret plot or conspiracy on the part of the board of trustees to defraud the stockholders of the company, and turn over the townsite to Ballaine, who afterwards rewarded them by giving them lots. The lips of three of these trustees are closed in death. This is one of the reasons why stale demands are not favored in law. Those living testify there was absolutely no thought of such a thing, and the witness John E. Ballaine when interrogated as to why no such minutes were kept, pertinently replied, that "They kept minutes of what they did, not of what they did not do." This seems a reasonable explanation and no presumption of fraud will be indulged in this respect.

This is one of those cases where the personal interest and bias of those claiming with the plaintiff draw such conclusions from the facts as will tend to bolster up and confirm their case, and their suspicions.

"All seems infected, that the infected spy;
As all looks yellow to the jaundiced eye."

To the impartial and unprejudiced mind, fully informed as to all the facts and circumstances surrounding this case, there can be but one conclusion—that the plaintiff has signally failed to sustain the allegations of its complaint.

Counsel for the plaintiff in his brief cites Seacoast R. Co. vs. Wood, 65 N. J. Eq. 530, footnote page 184 of 39th Volume of CYC., as follows:

> "Where a contractor, in purchasing lots for building a railroad, bought certain lots for terminal purposes in the same manner that he purchased the right of way and built the road as projected, so as to embrace and enter the terminal which thus became an essential part of the road, he is precluded from asserting that the terminal properties did not become a part of the road and setting up a personal right therein."

Plaintiff also cites the case of Trice vs. Comstock, 121 Fed. 620, as follows:

> "And within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of trustee and *cestui que trust,* principal and agent, client and attorney, employer and employee, who through

the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation. From the agreement which underlies and conditions these fiduciary relations, the law both implies a contract and imposes a duty that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, the trustee to his *cestui que trust,* that each shall work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created."

These cases might be in point if the Ballaines had been such officers, agents or employees of the Alaska Central Railway Company or the Tanana Construction Company, as to charge them with the duty of locating, purchasing or acquiring lands for either of said companies. But there is no testimony in this case to that effect. The clear preponderance of the testimony shows that while both Frank L. and John E. Ballaine were directors or members of the board of trustees of the Alaska Central Railway Company and the Tanana Construction Company, they had no control over the funds of either; and each of said companies had on its board of directors or trustees, men of unquestioned business standing and integrity, who were not dominated or controlled by the Ballaines.

Plaintiff further cites in his brief the 39th volume of CYC., pages 191 and 192 as follows:

> "The burden of proving fraud, actual or constructive, necessary to give rise to a constructive trust is upon the person alleging the existence of such a trust. But where a *prima facie* case of constructive fraud is made out from the fiduciary relationship of the parties and other circumstances connected with the transaction, the burden of affirmatively proving good faith is upon the party denying the existence of the trust."

This is no doubt a correct statement of the law. I have carefully considered the question as to the burden of proof and feel satisfied that even though the burden of proof were shifted to the defendants to explain their actions, that they have fully and satisfactorily done so by a clear preponderance of the testimony.

There are some side issues which were introduced in this case, which it is unnecessary to discuss, as it would not tend to make clear but rather complicate and confuse the main issue. The salient and essential features of the case have been above set forth, and I can reach no other conclusion than that the plaintiff take nothing by this action, and the plaintiff's complaint be dismissed, as well as the complaints in intervention. Findings and decree may be prepared accordingly.

Dated at Seward, Alaska, this 1st day of November, 1915.

FRED M. BROWN,
Judge.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 1, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. S–2, page No. 91.

In the District Court for the Territory of Alaska, Third Division.

No. 720.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA CENTRAL RAILWAY COMPANY, a Corporation, TANANA CONSTRUCTION COMPANY, a Corporation, JOHN E. BALLAINE, FRANK L. BALLAINE, et als.,

Defendants,

and

E. A. SHEDD and C. B. SHEDD, Copartners Doing Business Under the Firm Name of E. A. SHEDD & COMPANY, J. P. THOMPSON,

Intervenors,

J. H. MACKLIN and INTERNATIONAL ASSETS, LTD.,

Substituted Intervenors.

Findings of Fact and Conclusions of Law in Alaska Northern Ry. Co. vs. Alaska Central Ry. Co., No. 720, District Court, Territory of Alaska, Third Division.

This action coming on for trial at the Special

Seward November, 1915, Term of the above-entitled court, and having been tried upon its merits before the Court, plaintiff being represented by T. C. West, Esq., and L. L. James, Jr., Esq., J. H. Macklin and International Assets, Ltd., substituted intervenors for J. P. Thompson and E. A. Shedd & Co., were also represented by T. C. West, Esq., and L. L. James, Jr., Esq., and the defendants, John E. Ballaine and Frank L. Ballaine, being represented by S. O. Morford, L. V. Ray and James A. Haight, their counsel of record, and the Court having heretofore, to wit: on the 1st day of November, 1915, in open court, made and entered its order in said cause ratifying, adopting and confirming all and every the proceedings of whatever nature or description had and done at a hearing held on October 20th, 21st, 22d, 23d, 25th, 26th, 27th and 28th, pursuant to stipulation therefor, said order of ratification having by its terms declared all proceedings had pursuant to said stipulation to be of the same force and effect as if the same had in fact been produced, taken and had in open court, and were declared to be by said Court binding and controlling upon all the parties, and including said substituted intervenors, to wit: J. H. Macklin and International Assets, Ltd., and by said order said Court sets forth that "said cause now stands upon the records of this court as having been fully and completely tried and presented, now awaiting the determination and decision of this Court"; and thereafter, in open court, on said 1st day of November, 1915, the Judge of the above-entitled court did announce its decision upon all matters of

equity, law and fact theretofore presented as aforesaid in favor of defendants Ballaine and against plaintiff, and did in said opinion so rendered order that findings and decree in said cause be prepared in accordance with such decision; now, therefore, the Court, being fully advised in the premises, does hereby make and order entered its findings of fact and conclusions of law deduced therefrom as follows, to wit:

THE COURT FINDS:

1. That the plaintiff, Alaska Northern Railway Company, is a corporation organized and existing under and by virtue of the laws of the State of Washington, and has been engaged in the business of constructing and operating a railroad in the Third Division of the Territory of Alaska, and that plaintiff has complied with all laws applicable to Alaska relative to and governing foreign corporations doing business in Alaska.

2. That prior to the year 1904, the Alaska Central Railway Company, one of the defendants above named, was duly and regularly organized and formed under the laws of the State of Washington, and thereafter until about the month of October, 1909, carried on a general railroad business within the Third Division of the Territory of Alaska.

3. That the plaintiff corporation was formed for the purpose of acquiring, and in about the month of October, 1909, by proceedings duly and regularly had, did acquire all the assets of said Alaska Central Railway Company in said Territory of Alaska, and

the plaintiff has ever since been and now is the owner thereof.

4. That the defendants, John E. Ballaine and Frank L. Ballaine, in the year 1902, became associated together as copartners engaged in certain business ventures, which said relation as copartners continued up to on or about the first day of June in the year 1912.

5. That the Alaska Central Railway Company, corporation aforesaid, was organized March 31, 1902, and its first board of directors or trustees consisted of G. W. Dickinson, E. E. Caine, Charles L. Denny, J. W. Godwin, John E. Ballaine, George Turner, Charles F. Peck and John H. McGraw; the said Peck and Denny, however, failed to qualify or serve as such trustees and later, F. Aug. Heinze and James A. Haight were selected to take the places of said Denny and Peck, and said company was organized for the purpose and object of constructing a railroad from the head of Resurrection Bay, Territory of Alaska, to some available point on the Yukon River in said Territory; and, in the carrying out of the objects and purposes of said railroad company, certain employees of said company through its engineering department caused to be staked and located by means of alleged mineral locations, alleged trading site locations and other devices, the entire waterfront of Resurrection Bay from Lowell Point on the westerly side thereof to 4th of July Creek on the easterly side thereof, extending over and embracing an approximate distance of twelve miles along the shore of said Bay.

6. That in the spring and early summer of the year 1903, the funds of the Alaska Central Railway Company were at a very low ebb; the defendant, John E. Ballaine, and other members of the board of trustees had failed, after strenuous efforts, to raise money to finance said company, and one of said trustees, Mr. Heinze, had withdrawn from the company by reason of such fact, and Senator Turner of said trustees was in London, England, as a member of the Alaska Boundary Tribunal.

7. That in the month of June or July in the year 1903, the defendant, John E. Ballaine, urged upon the board of trustees of said Alaska Central Railway Company that said company should take some steps toward acquiring certain property located at and near the head of said Resurrection Bay, commonly described as the "Lowell Homestead"; and that said board of trustees, however, declined to take any steps toward the acquisition of said property, and that at a meeting of the board of trustees of said company at which were present John H. McGraw, G. W. Dickinson, E. E. Caine, J. W. Godwin, James A. Haight, Frank L. Ballaine, and John E. Ballaine said trustees determined to not enter upon the acquisition for the corporation of land speculative in value; and the defendant, John E. Ballaine, then endeavored to secure the co-operation of anyone, or all, of said trustees, individually, to become interested with him in acquiring the land embraced in the said Lowell Homestead location, located at the head of Resurrection Bay as aforesaid, but, that all and every of said trustees declined and refused to take

any part in said projected venture, and acquiesced in and made no objection to the proposal of said defendant, John E. Ballaine, to personally enter upon said venture.

8. That on August 12, 1903, at Seward, Alaska, the defendant, John E. Ballaine, through his brother and copartner, Frank L. Ballaine, procured in writing a relinquishment from said Mary Lowell, whereby she did relinquish to the United States Government her rights in and to the tract of land so held by her as a homestead, and that said relinquishment so procured was, together with the surveyor's field-notes of said tract, filed in the office of the Surveyor-General of the Territory of Alaska on or about August 19, 1903, and thereafter, on December 7, 1903, application to enter said tract under soldiers' additional homestead scrip was made at the U. S. Land Office at Juneau, Alaska, by the defendant, Frank L. Ballaine.

9. That the defendant, John E. Ballaine, paid from out of his own personal funds on July 20, 1903, the sum of two thousand and no/100 dollars ($2,000.00) for the soldiers' additional homestead scrip so used in connection with the application of the said Frank L. Ballaine for the land contained in surveys Nos. 726 North and 726 South, which said surveys included and covered the tract of land the right to which was relinquished by the said Mary Lowell to the United States Government as aforesaid.

10. That the defendant, Tanana Construction Company, was organized on August 11, 1903, pursu-

ant to and under the laws of the State of Washington as a corporation, its first board of trustees being composed of John Dowdle, Robert B. Evans, A. W. Swanitz, James A. Haight and John E. Ballaine, and was formed for the purpose of constructing the Alaska Central Railway under contract therefor.

11. That the defendant, John E. Ballaine, at all times prior to and during the organization of the Tanana Construction Company claimed to own and so stated to the trustees of said Tanana Construction Company, to wit, John Dowdle, Robert B. Evans and Alexander W. Swanitz that he, the said Ballaine, was a majority owner of the lands embraced in the Seward townsite.

12. That the board of trustees of the Tanana Construction Company were not subject to or under the control and domination of either of the defendants Ballaine, and that the Tanana Construction Company was independent of and not controlled by the Alaska Central Railway Company or by those who controlled the Alaska Central Railway Company, such corporations having separate officers, offices, stockholders and management, and in this regard the Court further finds that the Alaska Central Railway Company was controlled and managed by its President, George W. Dickinson, a man of extensive railroad experience and possessed of strong and positive characteristics.

13. That the Tanana Construction Company in 1904 under its contract with the Alaska Central Railway Company commenced to construct the first twenty-one miles of the Alaska Central Railway,

A. W. Swanitz being chief engineer and having the active management and control of said construction, and Elbridge R. Keeler being treasurer of said company and having sole and absolute control of the funds of said Company during said period.

14. That on February 2, 1904, the said Tanana Construction Company negotiated with E. A. Shedd & Company of Chicago a loan in the sum of two hundred thousand and no/100 dollars ($200,000.00) for the purpose of constructing and building said twenty-one (21) miles of railroad, and as security for the repayment of said loan, hypothecated to the said Shedds advance issue of bonds made by the Alaska Central Railway Company to cover the construction of said twenty-one miles theretofore delivered to said Tanana Construction Company to aid it in the prosecution of its construction contract, and that also at said time the defendant, John E. Ballaine, did put up and pledge as collateral security a deed from Frank L. Ballaine of all the lands embraced in said townsite, save and except for certain blocks of lots therein situated, to one Castle as trustee, and that said Seward townsite so placed as collateral as aforesaid was acknowledged by the Tanana Construction Company by Robert B. Evans, by Alexander W. Swanitz, by John Dowdle and James A. Haight to be owned and actually belonging to the said defendant, John E. Ballaine.

15. That at the time of the securing of said loan from A. E. Shedd & Company by the Tanana Construction Company and the depositing of the collateral described in the foregoing finding as security

for such loan on February 1st, 1904, all of the stockholders of the Tanana Construction Company signed a contract with John E. Ballaine recognizing and acknowledging the Seward townsite to be the property of John E. Ballaine, and said contract between the stockholders of the Tanana Construction Company and said defendant, John E. Ballaine, provided further that in consideration of the fact that said Ballaine had put up his individual property, the Seward townsite, as part collateral that said Ballaine should have the right himself to pay all of the sum of fifty thousand and no/100 dollars ($50,000.00) additional to the Shedd loan of two hundred thousand dollars, in case the other stockholders of the Tanana Construction Company failed to raise their *pro rata* of said fifty thousand dollars.

16. That the stockholders of the said Tanana Construction Company failed to raise any part of the sum of fifty thousand dollars required to be raised by said stockholders under the terms of the Shedd contract, and the said defendant, John E. Ballaine, did raise all of said sum of fifty thousand dollars and paid it in to the order of E. A. Shedd as in the Shedd contract provided, whereupon, the said John E. Ballaine became the owner of all the stock of said Tanana Construction Company.

17. That in the month of December, 1904, the terms of the contract between said E. A. Shedd & Company and said Tanana Construction Company were fully complied with, payment of the sum loaned duly made, and all collateral security theretofore pledged to secure said loan was released, including

said lands embraced in Seward townsite, and the same were by deed reconveyed to the said Frank L. Ballaine by the said Castle, trustee aforesaid, and thereafter duly made of record in the office of the *ex-officio* Recorder of Kenai Precinct at said Seward, Alaska, and the control of the said Alaska Central Railway Company became vested in the hands of one A. C. Frost and associates.

18. That one Elbridge R. Keeler, the treasurer of said Tanana Construction Company, was by the terms of the Shedd contract hereinbefore referred to special disbursing officer and a special representative of the said E. A. Shedd & Co. at Seward, Alaska.

19. That on June 2d, 1904, payment of the sum of four thousand and no/100 dollars ($4,000.00) to the said Mary Lowell as part consideration for the relinquishment by her heretofore given was made by one Elbridge R. Keeler, said consideration of four thousand dollars at said time being evidenced by a note made payable to the said Mary Lowell in said sum of four thousand dollars, payable nine months after date, dated September 2d, 1903, and signed by the Seward Townsite Company by John E. Ballaine, President, said Seward Townsite Company being a style of copartnership name under which the defendants, John E. Ballaine and Frank L. Ballaine, expected to carry on business matters connected with said entry; that thereafter, the said John E. Ballaine paid to the said Elbridge R. Keeler the said sum of four thousand dollars so advanced by said Keeler in payment of said note as aforesaid, and that said four thousand dollars so repaid to said Keeler

as aforesaid by the said Ballaine was paid out of and from personal funds belonging to and owned by the said defendant, John E. Ballaine.

20. That the said Elbridge R. Keeler in so advancing the said sum of four thousand dollars in payment of the said Lowell note acted upon his own responsibility after consultation with the said A. W. Swanitz, and that the Court finds that the payment by said Elbridge R. Keeler of said sum of four thousand dollars on account of said note was made for the express purpose of protecting Shedd & Company in respect to the Seward townsite lands then held by Shedd & Company as collateral security from John E. Ballaine, individually, for the payment of the loan of two hundred thousand dollars made in accordance with their contract of February 1, 1904, to the Tanana Construction Company.

21. The Court further finds that the payment of said sum of four thousand dollars by the said Elbridge R. Keeler from the funds of the Tanana Construction Company and E. A. Shedd & Company in payment to Mary Lowell as part consideration for the relinquishment by her of her said homestead entry was by said Keeler made without the knowledge or authority of the said John E. Ballaine or of the said Frank L. Ballaine.

22. That the defendant, John E. Ballaine, and the defendant, Frank L. Ballaine, or either of them, never at any time diverted any funds of the Alaska Central Railway Company or the Tanana Construction Company, and never at any time had the funds of either of said companies under their control.

23. That the plaintiff has wholly failed to prove the allegation in its complaint to the effect that the defendant, John E. Ballaine, while an officer and trustee of the Alaska Central Railway Company, or at any time, was in the possession either personally or by those under his immediate control and direction of large sums of money belonging to the said Alaska Central Railway Company, or at all, and plaintiff has wholly failed to prove its allegation that the defendant, John E. Ballaine, while acting in his capacity as an officer and trustee of said Alaska Central Railway Company, unlawfully, without the knowledge and consent of said corporation, diverted the sum of three thousand and no/100 dollars ($3000.00) of the funds of said corporation, and purchased therewith soldiers additional homestead scrip, which he used for the purpose of locating the townsite of Seward aforesaid, or at all; and plaintiff has wholly failed in its proof to sustain its allegation that in about the month of June, 1904, or at any time the defendant, John E. Ballaine, did fraudulently and without the knowledge or consent of the said Alaska Central Railway Company divert the sum of four thousand dollars of the funds of said corporation with which to purchase certain releases from Mary Lowell of the lands comprising a portion of the townsite of Seward, or at all, and further, that the plaintiff has wholly and absolutely failed to prove its allegation that said funds so alleged to belong to said Company and so alleged to have been unlawfully diverted were used and diverted by the said defendant, John E. Ballaine, in

pursuance of a fraudulent scheme to defeat and defraud said Railway Company, and further, that the plaintiff has wholly failed to prove its allegation that the issuance of United States patents for the lands embraced in said townsite were issued in fraud of rights of the plaintiff, of the defendants, Alaska Central Railway Company, Tanana Construction Company, or the intervenors named in this action, or of any person or persons whomsoever.

24. That the defendants, Frank L. Ballaine and John E. Ballaine, were the owners (John E. Ballaine two-thirds, Frank L. Ballaine one-third) on the 20th day of May, 1905, and were entitled to the possession of all the lands comprised in said townsite of Seward hereinbefore mentioned and described as follows, to wit:

> Beginning at Corner Number One, being the northeast corner of Survey No. 726 North; a granite stone monument, marked "Cor. 1, S. 726 N."; thence south along the east line of Survey No. 726 N. 24.83 chains to the southeast corner of said Survey No. 726 N., a granite stone monument marked "S. 726 N., Cor. 2"; thence west parallel with the north boundary of said Survey No. 726 N., 32.21 chains to the southwest corner of said Survey No. 726 N., being Corner Number Three of said Survey No. 726 N., a granite stone monument marked "S. 726 N., Cor. 3"; thence north along the west line of said Survey No. 726 N., 24.83 chains to Corner Number Four of said Survey No. 726 N., being the northwest corner of said Survey No. 726 N., a granite stone

monument marked "Cor. 4, S. 726 North"; thence east along the north line of said Survey No. 726 N., 32.21 chains to place of beginning, containing seventy-nine acres and ninety-eight one-hundredths of an acre; the patent to the above described premises being dated May 20, 1905.

Beginning at Corner No. 2 of Survey No. 726 N., in the District of Alaska, a granite stone monument marked "S. 726 N., Cor. 2," and also marked "S. 726 S., Cor. 1," being the northeast corner of said Survey No. 726 S., in the District of Alaska; thence south along the east line of said Survey No. 726 S. 17.17 chains to Corner Number Two of said Survey No. 726 S., which is 2.87 chains south of Witness Corner to said Corner No. 2 of said Survey No. 726 S., which witness corner is a granite stone monument marked "S. 726 S. Cor. 2, W. C."; thence from corner Number Two of said Survey No. 726 S., following the meander line of said Survey No. 726 S., as follows: South forty-five degrees west 3.10 chains, south sixty-eight degrees forty-five minutes west 4.30 chains, west 2.80 chains, south sixty-six degrees thirty minutes west 10.30 chains, south sixty degrees west 8.10 chains, south fifty-five degrees west 6.40 chains, south seventeen degrees fifteen minutes west 5 chains to Corner Number three of said Survey No. 726 S., being 0.67 chains south of witness corner to Corner Number Three of said Survey No. 726 S., which witness corner is a granite stone

monument marked "S. 726 S., Cor. 3, W. C."; thence from said corner Number Three of said Survey No. 726 S. north along the west line of said Survey No. 726 S., 37.50 chains to the northwest corner of said survey No. 726 S., being Corner Number Three of said Survey No. 726 N., and marked "S. 726 N. Cor. 3," also marked "S. 726 S. Cor. 4"; thence east along the south line of said Survey No. 726 N., being the north line of said Survey No. 726 S. 32.21 chains to place of beginning, containing seventy-nine acres and ninety-seven and one hundredths of an acre.

The patent to the above described premises being dated May 1, 1905. Each of said two patents are now of record in the office of the U. S. Commissioner and ex-officio Recorder of the Kenai Recording Precinct, in the Town of Seward, in the Territory of Alaska, to which records reference is hereby made.

and have been in the lawful possession thereof since said 20th day of May, 1905, and since the 12th day of August, 1903, the date of relinquishment by said Mary Lowell of her right in and to said land, and now are the owners, both in law and equity, of said premises, and the possession of the said John E. Ballaine and Frank L. Ballaine in and to said premises in question, except and save as to those certain lots, tracts or parcels of land by them conveyed by deed to sundry persons, has been actual, continuous, open, notorious, uninterrupted, and adverse under

claim and color of right and title, adverse to all the world.

25. That the plaintiff has wholly failed to prove that the lands described in the foregoing finding are charged with and subject to a trust in favor of the plaintiff, the defendant, Alaska Central Railway Company, the defendant, Tanana Construction Company, the intervenors or substituted intervenors, or that the legal title to said lands or any portion thereof was held by either or both said defendants, Ballaine, in trust for the use and benefit of the plaintiff, said defendants and intervenors hereinbefore named or of any person, persons, natural or artificial, whomsoever.

26. That plaintiff has wholly failed to prove that the defendant, Frank L. Ballaine, has been and still is or was ever a dummy alleged owner of the townsite of Seward; that the plaintiff has wholly and absolutely failed to prove that the defendants, John E. Ballaine and Frank L. Ballaine, hold the title to the real property located in the townsite of Seward, so-called, for and on behalf of the plaintiff, and has wholly, entirely and absolutely failed to prove that the said John E. Ballaine and Frank L. Ballaine are, and each of them is, a trustee *ex malficio* for and on behalf of the said plaintiff.

27. That the said plaintiff has wholly failed to submit proof of its allegation that the defendant, John E. Ballaine, acting for himself and through his brother and copartner, Frank L. Ballaine, took advantage of the objects and plans of the Alaska Central Railway Company, attempted to and did

secure the title in the name of the said Frank L. Ballaine to the said townsite in violation of the trust of the said John E. Ballaine towards said Alaska Central Railway Company, but, on the contrary, the court finds that the undisputed testimony in the case shows that in the month of June or July in the year 1903, the defendant, John E. Ballaine, strongly urged upon the directors and trustees of the Alaska Central Railway Company that they acquire and take steps to acquire the land embraced in the Mary Lowell homestead tract, situated at the head of Resurrection Bay, Alaska, but that said trustees refused to risk the funds of the company, for the experiment of investing in land for speculative purposes, it being doubtful as to the right of said railway company to acquire lands other than those necessary for its corporate business; and all the other trustees not only refused to join the defendant, John E. Ballaine, in seeking to acquire title or ownership to said homestead tract, but also refused to permit the funds of the company to be invested in such experiment, and further, with full and complete knowledge of the entire matter and possessing all of the knowledge which the defendant, John E. Ballaine, then possessed with reference to the said homestead tract, expressly acquiesced in its attempted acquisition by John E. Ballaine; the Court further finds that there was no concealment, fraud, artifice or deception attempted or practiced on the part of the defendants, John E. Ballaine or Frank L. Ballaine, or by and upon the part of said board of trustees; and further, that said trustees and said defendants

Ballaine acted honestly within the powers conferred upon them as such trustees, and not in fraud of the the rights of the stockholders or creditors of such corporation, but was an action taken on the part of said board of trustees in good faith and with diligence and fairness, having due regard to the interests of said Alaska Central Railway Company and the interests of its stockholders, and further, that the defendants Ballaine were in no manner charged with the duty of locating or acquiring townsites or other lands for said Alaska Central Railway Company.

28. The Court further finds that until April 29th, 1915, the date of filing complaint in this action, no claim either legal or equitable was ever asserted in and to the property designated as the Seward townsite by the plaintiff, Alaska Northern Railway Company, by the defendant, Alaska Central Railway Company, by the defendant, Tanana Construction Company, by the intervenors or substituted intervenors, or by any person or persons, natural or artificial, or at all.

29. That in certain foreclosure proceedings heretofore had in this court relative to the property of the Alaska Central Railway Company in actions entitled "The Trusts and Guarantee Company, Limited, Plaintiff, vs. Alaska Central Railway Company, Tanana Railway Construction Company and Central Trust Company of Illinois, Defendants," and the case of "Central Trust Company of Illinois, Plaintiff, vs. Alaska Central Railway Company, The Trusts and Guarantee Company, Limited, and the Tanana Railway Construction Company, Defend-

ants,'' the lands embraced in said Seward townsite were not a part of the property sold under said foreclosure sale pursuant to decree, nor were said lands included in the conveyances made by Marshal's Deed in said foreclosure proceedings, nor was a sale of the property of the Alaska Central Railway Company included in said Seward townsite by said court ever approved or confirmed.

30. The Court further finds that plaintiff has failed to prove that said defendants, John E. Ballaine and Frank L. Ballaine, in the acquisition of the lands embraced in said Seward townsite as described in complaint of plaintiff, did in any manner, either in their capacity as trustees of the Alaska Central Company or as individuals through artifice, fraud, deception or otherwise, take advantage of the said Railway Company or the said Tanana Construction Company, nor did they acquire said lands adverse to the interests of or prejudicial to the rights and interests of the said Alaska Central Railway Company and Tanana Construction Company.

31. That at the time the defendants Ballaine took up the land embraced in said Seward townsite, the defendant, Alaska Central Railway Company, might have acquired other land on the shore of Resurrection Bay, Alaska, within a distance from a mile to ten miles from said townsite, where dock sites had been mapped out and platted in the year 1902 by the survey parties of the Alaska Central Railway then in the field.

32. That the defendants Ballaine, during the year 1905, conveyed to the said Alaska Central Railway

Company all necessary rights-of-way through the said Seward townsite for railway purposes, also a tract of land containing approximately seven (7) acres for depot grounds, and a number of lots for office and other building purposes, and that such conveyances, so made by said Ballaines, were accepted by said Alaska Central Railway Company, and upon the transfer of its property to the plaintiff corporation, plaintiff received and accepted the same.

33. That the Alaska Central Railway Company, by filing maps and plats of its definite location, located and acquired from the United States Government certain tracts of land and riparian rights adjacent to the land owned by the defendants Ballaine and the subject matter of this action.

34. That the plaintiff has wholly failed to prove that certain conveyances made by the defendants Ballaine to various officers and trustees of the Alaska Northern Railway Company, of the Alaska Central Railway Company and of the Tanana Construction Company were without consideration and were made to such persons by said Ballaines pursuant to and as a part of a conspiracy to defraud the Alaska Central Railway Company from its alleged interest in said Seward townsite, but that said conveyances so made to such persons were made for a valuable consideration, in good faith and fairly, without concealment, and not in fraud of the rights or prejudicial to the interests of the Alaska Central Railway Company, of the Alaska Northern Railway Company, or of their respective stockholders and creditors; and that the lots contained in such conveyances were

located in rather a remote portion of the Town of Seward and had little or no value at the date of said conveyances, except a purely speculative one, and have little or no value now, except a purely speculative one.

35. That the plaintiff has wholly failed to prove its allegations in its complaint set forth in paragraph eight thereof to the effect that when the said Alaska Central Railway Company was formed, it was formed for the purpose of acquiring and owning the townsite of Seward, Alaska; and that the said defendant, John E. Ballaine, acting for himself and through his agent and dummy, the defendant, Frank L. Ballaine, taking advantage of the objects and plans of the Alaska Central Railway Company, attempted to and did secure the title in the name of the said Frank L. Ballaine to the said townsite in violation of the trust of the said John E. Ballaine in and towards the said Alaska Central Railway Company.

36. That in about the year 1905, one A. C. Frost came into the control of the enterprises connected with the Alaska Central Railway Company, and he and his associates bought up all the stock of said Company that had been formerly sold, which they could find, and nearly all those who had originally bought stock of said Company, sold same back to Frost and his associates at a profit.

37. The Court further finds that the plaintiff has signally failed to sustain the allegations in its complaint contained, wherein it attempts to establish a trust in the defendants Ballaine of the lands embraced in said Seward townsite, for the use and bene-

fit of the plaintiff, of the defendant, Alaska Central Railway Company, the defendant, Tanana Construction Company, and the intervenors and substituted intervenors herein.

Made and ordered entered, in open court, this 9th day of November, A. D. 1915.

FRED M. BROWN,
District Judge.

Entered Court Journal No. S.–2, page No. 133.

From the above and foregoing FINDINGS OF FACT, the Court makes and deduces the following

CONCLUSIONS OF LAW.

I.

That the defendants, John E. Ballaine and Frank L. Ballaine, are entitled to a decree of this court dismissing, on the merits, the complaint of plaintiff and also the complaints in intervention, and that said defendants Ballaine do have and recover from said plaintiff their costs herein.

Let a decree be entered accordingly.

Made and ordered entered, in open court, this 9th day of November, A. D. 1915.

FRED M. BROWN,
District Judge.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 9, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 5–2, page No. 142.

In the District Court for the Territory of Alaska, Third Division.

No. 720.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA CENTRAL RAILWAY COMPANY, a Corporation, TANANA CONSTRUCTION COMPANY, a Corporation, JOHN E. BALLAINE, FRANK L. BALLAINE, et al.,

Defendants,

and

E. A. SHEDD and C. B. SHEDD, Copartners Doing Business Under the Firm Name of E. A. SHEDD & COMPANY, J. P. THOMPSON,

Intervenors,

J. H. MACKLIN and INTERNATIONAL ASSETS, LTD.,

Substituted Intervenors.

Judgment in Alaska Northern Ry. Co. vs. Alaska Central Ry. Co. et al., No. 720, in District Court for the Territory of Alaska, Third Division.

This action came on to be heard at the Special Seward November, 1915, Term of the above-entitled court, plaintiff and the substituted intervenors above named appearing by their counsel of record, T. C. West, Esq., and L. L. James, Jr., Esq., the defendants, Frank L. Ballaine and John E. Ballaine,

appearing by their respective counsel of record, S. O. Morford, L. V. Ray and James A. Haight; and the Court, having, heretofore, to wit, on the 1st day of November, 1915, in open court, made and entered its order in said cause ratifying, adopting and confirming all and every the proceedings of whatever nature or description had and done at a hearing held on October 20th, 21st, 22d, 23d, 25th, 26th, 27th and 28th, pursuant to stipulation therefor, said order of ratification having by its terms declared all proceedings had pursuant to said stipulation to be of the same force and effect as if the same had in fact been produced, taken and had in open court, and were declared to be by said Court binding and controlling upon all the parties, an including said substituted intervenors, to wit: J. H. Macklin and International Assets, Ltd., and by said order said Court sets forth that "said cause now stands upon the records of this court as having been fully and completely tried and presented, now awaiting the determination and decision of this court"; and thereafter, in open court, on said 1st day of November, 1915, said Court did announce its decision upon all the issues in said cause against the plaintiff and intervenors, and substituted intervenors, dismissing the complaint of plaintiff and the said complaint in intervention, and said court did thereafter, on the 9th day of November, 1915, make and enter in writing, its findings of fact upon all the material issues of fact presented by the pleadings, together with its conclusions of law deduced therefrom; and the Court, being fully advised in the premises.

IT IS ORDERED, ADJUDGED AND DECREED, that the complaint of plaintiff and the complaints in intervention be, and the same are hereby ordered dismissed; and

IT IS FURTHER ORDERED that the defendants, Frank L. Ballaine and John E. Ballaine, do have and recover their costs and disbursements herein from the plaintiff.

Done in open court this ninth day of November, A. D. 1915.

FRED M. BROWN,
District Judge.

[Endorsements]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 9, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. S. 2, page No. 143.

Certificate of Judge, District Court, Territory of Alaska, Third Division, and Certificate of Clerk, District Court, Hon. Fred M. Brown, Presiding Judge of the District Court for the Territory of Alaska, Third Division.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Frank M. Brown, Judge of the District Court for the Territory of Alaska, Third Division, the same being a court of record, having by law a seal, do hereby certify that Arthur Lang was the clerk of said court on the dates when the annexed Opinion, Findings of Fact, Conclusions of Law, and Judgment were filed in said court, and that K. L. Monahan,

whose name is subscribed to the same was at the date of said certificate a duly qualified and acting deputy clerk of said court, acting as deputy clerk to said Arthur Lang, clerk as aforesaid, and as such has authority by law to take and certify acknowledgments or proof of the execution by any person of deeds and all other instruments in writing; that I am well acquainted with her handwriting, and verily believe that the signature to said Opinion, Findings of Fact, Conclusions of Law and Judgment is her genuine signature.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of said court to be affixed, at Seward, Alaska, on this 13th day of November, A. D. 1913.

[Seal] FRED M. BROWN,
Judge of the District Court for the Territory of Alaska, Third Division.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, by K. L. Monahan, Deputy Clerk, the said District Court being a court of record, having by law a seal, do hereby certify that Fred M. Brown whose name is subscribed to the above and foregoing certificate, was at the date of said certificates and is now the duly commissioned, qualified and presiding Judge of said court; and that I am well acquainted with his handwriting, and verily believe that the signature to said certificate is his genuine signature.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of said court, at Seward, Alaska, on this 13th day of November, A. D. 1915.

[Seal] K. L. MONAHAN,
Deputy Clerk of the District Court for the Territory of Alaska, Third Division.

[Endorsed]: Plaintiff's Exhibit #1. Cause #3122. Ballaine vs. W. J. Boland et al. Adm. Sept. 17th. Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 17, 1918. F. M. Harshberger, Clerk. By ————, Deputy.

No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 5, 1919. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 2—Complaint and Answer in Alaska Northern Ry. Co. vs. Alaska Central Ry. Co. et al., No. 720, in District Court, Territory of Alaska, Third Division.

In the District Court in and for the Territory of Alaska, Third Division.

COPY.

No. 720.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA CENTRAL RAILWAY COMPANY, a Corporation, TANANA CONSTRUCTION COMPANY, a Corporation, JOHN E. BALLAINE, FRANK L. BALLAINE et al.,
Defendants.

Comes now the above-named plaintiff and for cause of action against the above defendants alleges as follows, to wit:

I.

That ever since the month of October, 1909, the plaintiff has been and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, having its principal office in the city of Seattle, in said State, and has been and now is engaged in the railroad business within the Third Judicial Division of Alaska. That said plaintiff has complied with the laws of Alaska enacted by Congress governing foreign corporations doing business in Alaska, and has complied with all of the requirements of Chapter 11 of the Session Laws of Alaska, approved April 21, 1913, and has paid its annual license fee last due as provided by Section 7, of said Chapter 11, of the Session Laws of Alaska.

II.

That prior to the year 1904, the Alaska Central Railway Company, defendant, was duly and regularly organized and formed under the laws of the State of Washington, having its principal place of business at Seattle aforesaid, and thereafter and until on or about the month of October, 1909, carried on a general railroad business within the Third Judicial Division of the Territory of Alaska.

III.

That the plaintiff corporation was formed for the purpose of acquiring, and in about the month of October, 1909, by proceedings duly and regularly had, did acquire all the assets of the said Alaska Central Railway Company, including its railroad running in a northwesterly direction from the Town of Seward, in said Territory of Alaska, and all its lines, buildings, rolling stock, and all its assets of every kind and description, and the plaintiff ever since has been and now is the owner thereof.

IV.

That in and prior to the year 1905, the defendant John E. Ballaine was the duly elected, qualified and acting director, officer and trustee of the said Alaska Central Railway Company and was in possession, either personally or by those under his immediate control and direction, of large sums of money belonging to the said Alaska Central Railway Company, and while the said defendant John E. Ballaine was so acting in said capacity as director, officer and trustee of the said Alaska Central Railway Company, he did unlawfully and without the knowledge and consent of said corporation divert the sum of Three Thousand Dollars of the funds of the said corporation and purchase therewith soldiers' additional homestead scrip which he used for the purpose of locating the Townsite of Seward aforesaid, a full description of which land is hereinafter contained, and in about the month of September, 1904, did fraudulently and without the knowledge or consent of the said Alaska Central Railway Company divert the

sum of Four Thousand Dollars, of the funds of said corporation, with which to purchase certain releases from Mary Lowell of the lands comprising a portion of the said Townsite of Seward, and in pursuance of a fraudulent scheme to defeat and defraud the said Alaska Central Railway Company did contrive to have and did have the said Townsite of the said Town of Seward, Alaska, located in the name of his brother and codefendant Frank L. Ballaine, and did contrive to have the Government of the United States issue to the said Frank L. Ballaine two certain patents, one on the first day of May, 1905, and the other on the twentieth day of May, 1905, for the lands comprising the said Townsite of Seward hereinbefore mentioned, which comprises the said Townsite, and is described in the said patents as follows, to wit:

Beginning at Corner Number One, being the Northeast corner of Survey No. 726 North, a granite stone monument, marked "Cor. 1, S. 726 N."; thence South along the East line of Survey No. 726 N. 24.83 chains to the Southeast corner of said Survey No. 726 N., a granite stone monument marked "S. 726 N., Cor. 2"; thence West parallel with the North boundary of said Survey No. 726 N., 32.21 chains to the Southeast corner of said Survey No. 726 N., being Corner Number Three of said Survey No. 726 N., a granite stone monument marked "S. 726 N., Cor. 3"; thence North along the West line of said Survey No. 726 N., 24.83 chains to Corner Number Four of said Survey No. 726 N., being the Northwest corner of said Survey No. 726 N., a granite stone monument marked "Cor. 4, S. 726 North"; thence East along

the North line of said Survey No. 726 N., 32.21 chains to place of beginning, containing seventy-nine acres and ninety-eight one-hundredths of an acre; the patent to the above-described premises being dated May 20, 1905.

Beginning at Corner No. 2 of Survey No. 726 N., in the District of Alaska, a granite monument marked "S. 726 N., Cor. 2," and also marked "S. 726 S., Cor. 1," being the Northeast corner of said Survey No. 726 S., in the District of Alaska; thence South along the East line of said Survey No. 726 S. 17.17 chains to Corner Number Two of said Survey No. 726 S., which is 2.67 chains South of Witness Corner to said Corner No. 2 of said Survey No. 726 S., which witness corner is a granite stone monument marked "S. 726 S. Cor. 2, W. C."; thence from corner Number Two of said Survey No. 726 S., following the meander line of said Survey No. 726 S., as follows: South forty-five degrees West 3.10 chains, West 2.80 chains, South sixty-six degrees thirty minutes West 10.30 chains, South sixty degrees West S. 10 chains, South fifty-five degrees West 6.40 chains, South seventeen degrees fifteen minutes West 5 chains to Corner Number Three of said Survey No. 726 S., being 0.67 chains South of witness corner to Corner Number Three of said Survey No. 726 S., which witness corner is a granite stone monument marked "S. 726 S., Cor. 3, W. C."; thence from said corner Number Three of said Survey No. 726 S. North along the West line of said Survey No. 726 S., 37.50 chains to the Northwest corner of said Survey No. 726 S., being Corner Number Three of said Sur-

vey No. 726 N., and marked "S. 726 N. Cor. 3," also marked "S. 726 S. Cor. 4"; thence East along the South line of said Survey No. 726 N. being the North line of said Survey No. 726 S. 32.21 chains to place of beginning, containing seventy-nine acres and ninety-seven one-hundredths of an acre. The patent to the above-described premises being dated May 1, 1905. Each of said two patents are now of record in the office of the U. S. Commissioner and ex-officio Recorder of the Kenai Recording Precinct, in the Town of Seward, in the Territory of Alaska, to which records reference is hereby made.

V.

That during all of the time hereinbefore mentioned the said defendant, Frank L. Ballaine, has been and still is a dummy alleged owner of the said Townsite and lands for and on behalf of the said John E. Ballaine, and holds the same for and on behalf of the said defendant John E. Ballaine.

VI.

That the said defendants John E. Ballaine and Frank L. Ballaine have entered into contracts for the sale of certain lots or portions of the said Townsite, an exact description of which is to the plaintiff unknown, with certain other persons, firms and corporations, whose names are unknown to the plaintiff herein, and are described under fictitious names of the defendants Does, and said persons, firms and corporations, designated under such fictitious names, will, unless restrained by the order of this Honorable Court, pay to the said defendants John E. Ballaine and Frank L. Ballaine the alleged purchase price of

the said lots and tracts of lands, and the same will become lost to the plaintiff herein.

VII.

That the defendants John E. Ballaine and Frank L. Ballaine hold the above-described real property aforesaid for and on behalf of the plaintiff, and are and each of them is a trustee *ex maleficio* for and on behalf of the plaintiff.

VIII.

That when the said Alaska Central Railway Company was formed it was formed for the purpose of building the said railroad and acquiring and owning the Townsite at Seward aforesaid, and the said defendant John E. Ballaine, acting for himself, and through his agent and dummy the defendant Frank L. Ballaine, taking advantage of the objects and plans and the said Alaska Central Railway Company attempted to and did secure the title in the name of said Frank L. Ballaine to the said Townsite in violation of the trust of the said John E. Ballaine in and towards the said Alaska Central Railway Company.

IX.

That at certain times and dates which are unknown to plaintiff the said defendants John E. Ballaine and Frank L. Ballaine sold and conveyed certain portions of lots out of said Townsite and received therefrom large sums of money, the amount of which is to plaintiff unknown, and the said defendants decline and refuse to account to plaintiff therefore.

X.

That the said defendants John E. Ballaine and Frank L. Ballaine deny plaintiff's claim to own the

said Townsite and all portions thereof, and refuse to acknowledge the claim of plaintiff to the ownership thereof in any form or manner; and have refused to still refuse to convey the same to plaintiff.

XI.

That the Tanana Construction Company, a corporation, was organized in or about the year 1904 under the laws of the State of Washington, having its principal office at Seattle, in said State; that said corporation was and ever since has been a dummy and creature of the said defendants Alaska Central Railway Company, said John E. Ballaine being an officer, director and trustee of both the defendants Tanana Construction Company and Alaska Central Railway Company, as aforesaid. The said defendant Tanana Construction Company claims some interest in the lands and premises hereinbefore described, adverse to the claim of this plaintiff, the exact nature of said alleged claim by said defendant Tanana Construction Company is unknown to plaintiff, but plaintiff alleges that the alleged claim of said defendant Tanana Construction Company is illegal and void as against the rights of plaintiff to said lands and premises.

XII.

That this action is brought on behalf of plaintiff and also on behalf of all other persons, firms and corporations who are creditors of the defendant Alaska Central Railway Company, and who may care to participate in this action.

WHEREFORE, plaintiff prays judgment of the Court as follows:

First: That the said defendants and each of them convey to plaintiff by good and sufficient deed the title to the said lands and premises.

Second: That a decree be entered adjudging that the defendants and each of them hold the said lands and premises in trust for the said plaintiff.

Third: That the defendant's account to the plaintiff for all moneys received and to be received for and on account of the sale of the said lands and premises, or any part or portion thereof.

Fourth: That an injunction be issued directed to the said defendants and each of them restraining them and each of them from selling, disposing of or alienating the title to the said lands and premises, or to any part or portion thereof, until the termination of this suit, and permanently thereafter.

Fifth: For such other and further relief as to the Court may seem just.

Sixth: That the plaintiff have and recover his costs and disbursements herein expended.

T. C. WEST and
DONOHUE & DIMOND,
Attorneys for Plaintiff.

In the District Court for the Territory of Alaska, Third Division.

No. 720.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA CENTRAL RAILWAY COMPANY, a Corporation, TANANA CONSTRUCTION COMPANY, a Corporation, JOHN E. BALLAINE, FRANK L. BALLAINE, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, SIXTH DOE, SEVENTH DOE, EIGHTH DOE, NINTH DOE, TENTH DOE, ELEVENTH DOE, TWELFTH DOE, THIRTEENTH DOE, FOURTEENTH DOE, FIFTEENTH DOE, SIXTEENTH DOE, SEVENTEENTH DOE, EIGHTEENTH DOE, NINETEENTH DOE, TWENTIETH DOE, TWENTY-FIRST DOE, TWENTY-SECOND DOE, TWENTY-THIRD DOE, TWENTY-FOURTH DOE, TWENTY-FIFTH DOE, TWENTY-SIXTH DOE, TWENTY-SEVENTH DOE, TWENTY-EIGHTH DOE, TWENTY-NINTH DOE, THIRTIETH DOE,

Defendants.

Separate Answer of John E. Ballaine, in Alaska Northern Ry. Co. vs. Alaska Central Ry. Co. et al., No. 1020, in District Court for the Territory of Alaska, Third Division.

Comes now John E. Ballaine, one of the defendants above named, and in answer to the complaint of plaintiff on file herein, states:

I.

That this defendant admits the allegations contained in paragraph I of plaintiff's complaint.

II.

That this defendant admits the allegations contained in paragraph II of plaintiff's complaint.

III.

That this defendant denies the third paragraph of plaintiff's complaint, as therein set forth, and alleges the fact to be that the said plaintiff, Alaska Northern Railway Company, was formed for the purpose of acquiring and did acquire the assets of the Alaska Central Railway Company, which said assets had heretofore, on or about the first day of October, 1909, at Valdez, Alaska, been sold at receiver's sale under order of the Court, and that the lands described in plaintiff's complaint were not included in the sale then and there had by said receiver, and were not at said time, the property of the Alaska Central Railway Company, and no claim to said lands was ever asserted in said proceedings, or otherwise, or at all, by said Alaska Central Railway Company.

IV.

That this defendant denies the allegations con-

tained in paragraph IV of plaintiff's complaint, and alleges the fact to be that on and during the year 1903 this defendant and the defendant Frank L. Ballaine, then copartners, this defendant two-thirds and the said Frank L. Ballaine one-third, acquired by purchase relinquishments to the United States from one Mary Lowell, for a portion of the lands described in plaintiff's complaint, and paid to the said Mary Lowell therefor, the sum of Four Thousand ($4,000.00) Dollars and subsequently conveyed to the said Mary Lowell thirty-seven lots in said Seward; and since said year of 1903 this defendant and the defendant Frank L. Ballaine have been in the open, notorious, continuous and lawful possession of the lands described in plaintiff's complaint, adverse to all the world, and, that during the year 1903 this defendant and the said Frank L. Ballaine, in the name of the said Frank L. Ballaine, acquired soldiers' additional homestead scrip, and filed the same upon the lands described in plaintiff's complaint, and such proceedings were thereafter had that patents were issued by the United States Government to the said Frank L. Ballaine conveying the lands in the said complaint described; that said sum of Four Thousand ($4,000) Dollars, so paid as aforesaid to the said Mary Lowell, and the purchase price paid for said soldier's additional scrip, the costs and expenses of a survey of said lands, for advertising and all other expenses incident and usual to the securing of patent for lands from the federal government, were actually paid by this defendant solely and alone, and that not one dollar or any portion of said sums, or at

all, was ever advanced or paid on account thereof, or in any manner, by the Alaska Central Railway Company or the Tanana Construction Company, and further, that in the procuring of said patents due notice was given by posting on the land, and publication, as by the laws of the United States required, and no adverse claim was filed, asserted or claimed by said Alaska Central Railway Company or the Tanana Construction Company, or by any other person or persons, corporation or corporations whatsoever.

V.

That in answer to paragraph V of said complaint this defendant denies that the said Frank L. Ballaine was or is acting as a dummy on behalf of this defendant, but alleges the fact to be that said Frank L. Ballaine and this defendant were copartners in acquiring the title to said property.

VI.

Answering paragraph VI of said complaint, this defendant admits that said Frank L. Ballaine and this defendant have entered into contracts for the sale of certain lands included in the description of lands contained in plaintiff's complaint as they had a lawful right to do.

VII.

In answer to paragraph VII of said complaint, this defendant denies the same and each and every allegation therein contained.

VIII.

Answering paragraph VIII of said complaint, this defendant denies that the Alaska Central Railway Company was formed for the purpose of acquiring

or owning the said Townsite at Seward, Alaska, but alleges the fact to be that said Alaska Central Railway Company never at any time had any interest, claim or right to the lands embraced in said townsite, being the lands described in plaintiff's complaint, never asserted or claimed any right or interest thereto or therein or at all, save and except those certain tracts and parcels of land purchased and acquired by the said Alaska Central Railway Company from the said defendants Ballaine and conveyed to said Railway Company by deeds duly delivered by said Ballaines to said Company, and now of record.

IX.

Answering paragraph IX of said complaint, this defendant admits that the said Frank L. Ballaine and this defendant, have sold and conveyed certain portions or lots out of said townsite as they had a lawful right so to do, but denies that a demand of any sort, nature or description was ever made on this defendant, or upon the said Frank L. Ballaine, for an accounting of any money received from such sales, by said plaintiff, or at all.

X.

Answering paragraph X of said complaint, this defendant admits that said Frank L. Ballaine and this defendant own and claim to own the said townsite and all portions thereof, save and except such parcels and tracts as have been dedicated for streets and alleys, and such parcels as have been sold to other parties, including the various parcels and rights of way conveyed by deed and grant to said

Alaska Central Railway Company, and, further this defendant admits that he refuses to acknowledge the claim of plaintiff to the ownership thereof, and refuses to convey any portion of said townsite to plaintiff, and alleges that no demand has been made therefor.

XI.

Answering paragraph XI of said complaint, this defendant denies that the Tanana Construction Company claims any interest in said lands and premises, and denies that said Tanana Construction Company has any right, claim or interest in or to said tract of land, or any part thereof, or at all; and, this defendant denies that he is an officer, director and trustee of both the defendants Tanana Construction Company and Alaska Central Railway Company, and further denies that the said Tanana Construction Company was and ever since the year 1904 has been a creature and a dummy of the said defendant Alaska Central Railway Company.

And for a further and separate defense this defendant says:

I.

That the complaint herein fails to allege any matter of equity entitling the plaintiff to the relief prayed for therein; and, particularly, that on or about the 1st day of September, 1908, an action was commenced in the District Court for the Territory of Alaska, Third Division, at Valdez, Alaska, by the Trust & Guarantee Company, Limited, trustee of the bondholders of the Alaska Central Railway Company and others, and such proceedings were had therein

that all the assets of the Alaska Central Railway Company which were therein enumerated were sold and disposed of, and the lands described in plaintiff's complaint were not listed or claimed as a part of the assets of the said Alaska Central Railway Company, and were not a part of said assets, were not owned or claimed by said Railway Company, and said Railway Company had no interest therein.

And for a further and separate defense this defendant alleges:

I.

That the complaint herein fails to allege any matter of equity entitling the plaintiff to the relief prayed for therein; and, particularly, that the cause of action stated in said complaint did not accrue within ten years before the commencement of said action, in that this defendant and the said Frank L. Ballaine have been, since the month of August, in the year 1904, in the actual, continuous, open, notorious, uninterrupted and adverse possession of said lands described in plaintiff's complaint, under claim and color of right and title; that said possession was adverse to all the world, and shortly thereafter this defendant and the said Frank L. Ballaine caused said tract of land to be surveyed into lots, blocks, streets and alleys, dedicating to the town of Seward, said streets and alleys for the uses and purposes in said dedication set forth, and have expended large sums of money in the survey and improvement of the same; and, further that said Alaska Central Railway Company during its existence had knowledge of such claim and color of right and of all the various acts

of ownership exercised by said Frank L. Ballaine and this defendant relative thereto.

That for a further and separate defense this defendant says:

I.

That the plaintiff, as successor in interest of the said Alaska Central Railway Company, is the owner of and in the actual possession of certain parcels of land embraced in the lands described in plaintiff's complaint, the same having heretofore been conveyed and granted by the defendant Frank L. Ballaine, as grantor, to the said Alaska Central Railway Company, as grantee, as follows, to wit:

(a) By deed dated May 6, 1905, by Frank L. Ballaine, as Grantor, to the Alaska Central Railway Company, as Grantee, conveying a right of way for two railroad tracks upon, over and through a portion of the land embraced on U. S. Survey No. 726 South, duly witnessed and acknowledged and recorded in Book 1 of Deeds at pages 383 and 384 of the Cook Inlet Recording District, now designated as Kenai Recording District of the Third Division of the Territory of Alaska;

(b) By instrument in writing granting an easement upon and over certain lands embraced in U. S. Survey No. 726 South, for a right of way for railroad tracks, dated May 6th, 1905, given by Frank L. Ballaine as party of the first part, to the Alaska Central Railway Company, a corporation, as party of the second part; duly witnessed and acknowl-

edged and recorded in Book 1 of Leases at pages 6 and 7 of the Records of said Cook Inlet Recording District, now designated as Kenai Precinct of said Third Division of the Territory of Alaska;

(c) By Deed dated June 15, 1905, by Frank L. Ballaine and Genevieve Ballaine, his wife, as Grantors, to the Alaska Central Railway Company, a corporation, as Grantee, a certain tract of land containing seven and seven-tenths (7.7) acres embraced in U. S. Survey No. 726 South, duly witnessed and acknowledged, and recorded in Book 1 of Deeds, at pages 389, 390, 391 and 392 of the Records of said Cook Inlet Recording Precinct, now designated as Kenai Recording Precinct of the Third Division of the Territory of Alaska;

(d) By Deed containing a full covenant of warranty, dated June 15, 1905, by Frank L. Ballaine and Genevieve Ballaine, his wife, as Grantors, to the Alaska Central Railway Company, a corporation, as Grantee, Lots 16, 17, 18, 19, and 20 in Block 16 of the Townsite of Seward, duly witnessed and acknowledged and recorded in Book 2 of Deeds at pages 25 and 26 of the Records of Cook Inlet Recording Precinct, now designated as Kenai Recording Precinct of the Third Division of the Territory of Alaska;

—and for a further and more specific and particular description of said several tracts of land and rights

of way, and of the covenants of warranty in said instruments contained, express reference is hereby made to the official record of said instruments as hereinbefore set forth.

II.

That since the date of the execution of said instruments of conveyance, the Alaska Central Railway Company as grantee of the defendant Frank L. Ballaine, and since on or about October 1st, 1909, the plaintiff herein as successor to the estate of the said Alaska Central Railway Company, have been, and the said plaintiff now is, in the exclusive possession and control of said parcels of land and rights of way, save and except, that under and by virtue of the terms of a certain contract in writing entered into on the 10th day of April, 1915, wherein the Honorable Franklin K. Lane, as Secretary of the Interior of the United States, acting by authority of the President of the United States, under an act of Congress of the United States entitled "An act to Authorize the President of the United States to Locate, Construct and Operate Railroads in Alaska and for Other Purposes," approved March 12, 1914, is named as vendee, and W. G. Stavert, F. G. Jemmett and W. J. Boland as a committee for the management of the Alaska Central Railway Syndicate, are named as vendors, said vendors have contracted to convey and sell to said vendee all the stocks and bonds of the Alaska Northern Railway Company, plaintiff herein, and all the assets of said plaintiff as set forth in the schedules annexed to said contract, and including in said assets the several tracts of land and rights of

way so acquired as aforesaid, from said defendant Frank L. Ballaine, it being, however, expressly stated in said contract that said sale is not intended to include the claim of plaintiff herein, or of its said committee so named as vendors in said contract, against any person or persons whomsoever with reference to the title to the Seward Townsite, otherwise known as United States Surveys 726 North and South; other than certain lands, which designated lands are the tracts and lands hereinbefore specifically designated in this answer; provided, however, that in said contract of sale and the said Franklin K. Lane, as the representative of the President of the United States, vendee therein, expressly stipulates that he or the Alaska Northern Railway Company shall be under no obligation to prosecute the claims of said committee, so named in said contract as vendors, or the claim of any person or persons whomsoever with reference to the title to said Seward Townsite; and this defendant avers the plaintiff herein Alaska Northern Railway Company, a corporation, is not the real party in interest in and to said litigation, but alleges the said W. G. Stavert, F. G. Jemmett and W. J. Boland, vendors as aforesaid, are the real parties in interest therein.

III.

That this defendant alleges that the plaintiff ought not to be admitted to say the defendant Frank L. Ballaine and this defendant hold the title to the lands described in plaintiff's complaint as trustees *ex maleficio* for and on behalf of plaintiff, for the reason that said plaintiff as successor to the estate of

the said Alaska Central Railway Company holds title to the several tracts and parcels of land, including rights of way, hereinbefore specifically described, as grantee of the said defendant Frank L. Ballaine by deeds containing full covenants of warranty, said tracts and parcels of land being a part of and included in the description of lands contained in plaintiff's complaint, and so as aforesaid contracted through said committee as vendors to be sold and conveyed to the Honorable Secretary of the Interior of the United States, as vendee.

WHEREFORE, this defendant having fully answered the complaint of plaintiff herein prays that the same may be dismissed, and that this defendant be awarded his costs and disbursements herein.

L. V. RAY,
Attorney for Defendant John E. Ballaine.

[Endorsed]: Plaintiff's Exhibit #2. #3122. Ballaine vs. Boland et al. Adm. Sept. 17. Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 17, 1918. F. M. Harshberger, Clerk. By ————, Deputy.

No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 5, 1919. F. D. Monckton, Clerk.

Plaintiff's Exhibit No. 3—Lis Pendens in Alaska Northern Ry. Co. vs. Alaska Central Ry. Co., in District Court for the Territory of Alaska, Third Division.

In the District Court in and for the Territory of Alaska, Third Judicial Division.

No. 720.

ALASKA NORTHERN RAILWAY COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA CENTRAL RAILWAY COMPANY, a Corporation, TANANA CONSTUCTION COMPANY, a Corporation, JOHN BALLAINE, FRANK L. BALLAINE, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, SIXTH DOE, SEVENTH DOE, EIGHTH DOE, NINTH DOE, TENTH DOE, ELEVENTH DOE, TWELFTH DOE, THIRTEENTH DOE, FOURTEENTH DOE, FIFTEENTH DOE, SIXTEENTH DOE, SEVENTEENTH DOE, EIGHTEENTH DOE, NINETEENTH DOE, TWENTIETH DOE, TWENTY-FIRST DOE, TWENTY-SECOND DOE, TWENTY-THIRD DOE, TWENTY-FOURTH DOE, TWENTY-FIFTH DOE, TWENTY-SIXTH DOE,

TWENTY-SEVENTH DOE, TWENTY-EIGHTH DOE, TWENTY-NINTH DOE, THIRTIETH DOE,

Defendants.

Notice is hereby given that a suit has been commenced in the above-named court by the above-named plaintiff against the above-named defendants, which suit is now pending. That the object of said suit is to obtain a decree of the above-entitled court ordering and directing said defendants and each of them to convey to plaintiff by good and sufficient deed the title to the lands and premises hereinafter described; also to adjudge and decree that the defendants and each of them now hold the title to said lands and premises in trust for said plaintiff; also that said defendants account to plaintiff for all moneys received and to be received for and on account of the sale of any part or portion of the lands and premises hereinafter described; also to obtain an injunction against said defendants and each of them restraining them and each of them from selling, disposing, or aliening the title to said lands and premises, or any part or portion thereof pending this suit.

The lands and premises so affected by this suit are described as follows, to wit: Being U. S. Survey No. 726 North, patented on the 20th day of May, 1905, by the United States Government to Frank L. Ballaine, described as follows:

Beginning at Corner Number One, being the Northeast corner of Survey Number 726 North, a granite stone monument marked "Cor. 1, S. 726 N.";

thence South along the East line of Survey No. 726 N., 24.83 chains to the Southeast corner of said Survey to Corner Number Two of said Survey, being a granite stone monument, marked "S. 726 N., Cor. 2"; thence West parallel with the North boundary of said Survey, 32.21 chains to the Southwest corner of said Survey, being Corner Number Three of said Survey, a granite stone monument marked "S. 726 N. Cor. 3"; thence North along the West line of said Survey 24.83 chains to Corner Number Four of said Survey, being the Northwest corner of said Survey and marked by a granite stone monument, marked "Cor. 4, S. 726 N."; thence East along the North line of said Survey 32.21 chains to place of beginning, containing 79.98 acres.

Also U. S. Survey Number 726 South, patented on May 1, 1905, by the United States Government to Frank L. Ballaine, described as follows: Beginning at Corner Number Two of Survey No. 726 N., a granite stone monument marked "S. 726 N., Cor. 2," and also marked "S. 726 S., Cor. 1," being the Northeast corner of said Survey No. 726 S.; thence South along the East side of said Survey No. 726 S., 17.17 chains to Corner Number Two, which is 2.67 chains South of witness corner to said Corner Number Two of said survey, which witness corner is a granite stone monument, marked "S. 726 S., Cor. 2, W. C."; thence from Corner Number Two of said Survey, following the meander line of said Survey, as follows: South 45 degrees West 3.10 chains; South 68 degrees 45 minutes West 4.30 chains; West 2.80 chains; South 66 degrees 30 minutes West 10.30

chains; South 60 degrees West 8.10 chains; South 55 degrees West 6.40 chains; South 17 degrees 15 minutes West 5 chains; to Corner number Three of said Survey, being 0.67 chains South of Witness corner to Corner Number Three of said Survey, which witness corner is in a granite stone monument, marked "S. 726 S., Cor. 3, W. C."; thence from said Corner Number Three of said Survey North along the West line of said Survey 37.50 chains to the Northwest corner of said survey, being Corner Number Three of Survey No. 726 N. and marked "S. 726 N., Cor. 3," and also marked "S. 726 S., Cor. 4"; thence East along the South line of said Survey No. 726 N., being the North line of said Survey No. 726 S., 32.21 chains to place of beginning, containing 79.97 acres.

Said premises comprising what is commonly known as the Townsite of Seward, Alaska.

The United States Patents for each of the two above described tracts of land are now of record in the office of the United States Commissioner and *ex-officio* Recorder, of the Kenai recording precinct, in the Town of Seward, in the Territory of Alaska, to which records reference is hereby made.

Dated at Valdez, Alaska, this 29th day of April, 1915.

T. C. WEST and
DONOHUE & DIMOND,
Attorneys for Plaintiff.

The above instrument filed for record at 10 A. M. May 1st, 1915, by Donohue & Dimond.

M. J. CONROY,
District Recorder.

Territory of Alaska,
Third Division,
Kenai Recording District,—ss.

I, the undersigned United States Commissioner and *ex-officio* Recorder of the Kenai Recording District, Third Division, Territory of Alaska, do hereby certify that the foregoing is a full, true and correct copy of an original *Lis Pendens* as the same appears of record on pages 314–315 of Book 3 of Records, of records of said Recording District.

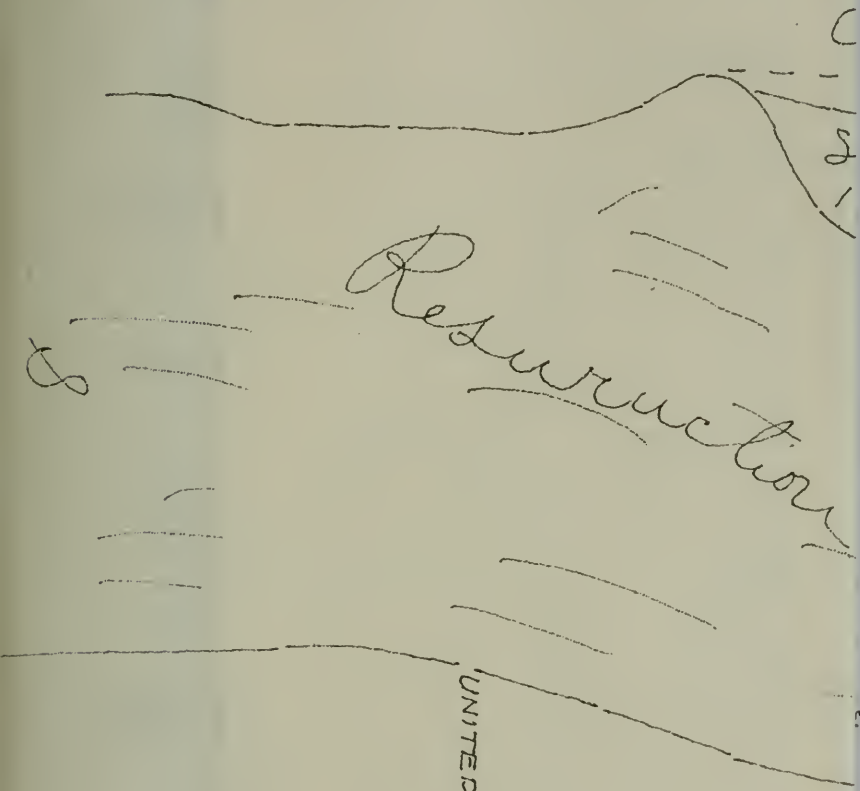
Witness my hand and my official seal affixed at Seward, Alaska, this 4th day of July, 1918.

[Seal] WM. H. WHITTLESEY,
U. S. Commissioner and Ex-officio Recorder.

[Endorsed]: Plaintiff's Exhibit #3. #3122. Ballaine vs. Boland et al. Adm. Sep. 17–18. Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 17, 1918. F. M. Harshberger, Clerk. By ————, Deputy.

No. 3421. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 5, 1919. F. D. Monckton, Clerk.

[PLAINTIFF'S EXHIBIT 4 - SH



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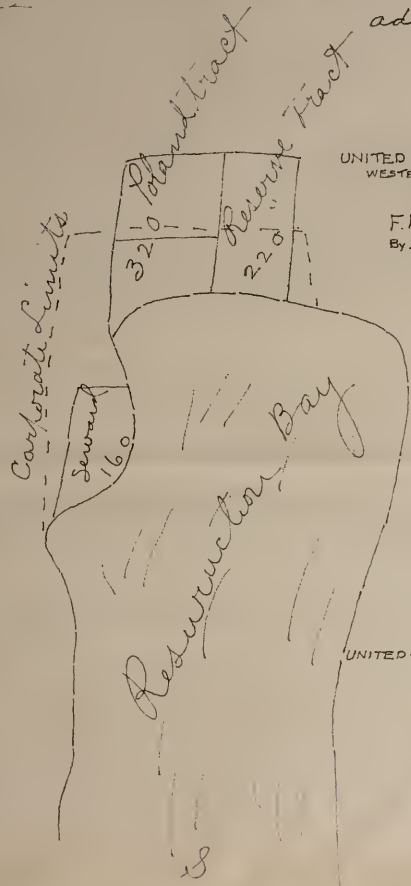
Plaintiff's Ex 4

#3122 Ballaine vs Bolosed

adm. Sept. 18th



FILED IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
SEP 19. 1918.
F. M. Harshberger, Clerk.
By ..... Deputy

No. 3421
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
DEC. 5. 1919
F. D. MONCKTON
Clerk.

PLAINTIFF'S EXHIBIT 4 - Sketch.

No. 3422

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK H. SCHURMANN,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3422

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK H. SCHURMANN,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For the United States of America:

S. C. HUBER, Esq., United States District Attorney, in and for the District and Territory of Hawaii, and JAS. J. BANKS, Esq., Assistant United States Attorney, in and for the District and Territory of Hawaii.

For the Respondent, Frank H. Schurmann:

C. H. McBRIDE, Esq., Honolulu, Hawaii.

[1*]

In the District Court of the United States in and for the District and Territory of Hawaii.

EQUITY NUMBER 10.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Defendant.

Order Extending Time to September 10, 1919, to Transmit Record on Appeal.

Now, on this 9th day of August, A. D. 1919, it appearing from the representations of the clerk of this court, that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited

*Page-number appearing at foot of page of original certified Transcript of Record.

therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this Court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to September 10, A. D. 1919.

Dated at Honolulu, Hawaii, August 9, A. D. 1919.

HORACE W. VAUGHAN,
Judge U. S. District Court, Hawaii.

Filed August 9, 1919. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk. [2]

In the District Court of the United States in and for the District and Territory of Hawaii.

No. 10—(EQUITY).

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Defendant.

Order Extending Time to October 10th, 1919, to Transmit Record on Appeal.

Now, on this 10th day of September, A. D. 1919, it appearing from the representations of the clerk of this court, that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth

Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to October 10th, A. D. 1919.

Dated at Honolulu, Hawaii, September 10th, A. D. 1919.

HORACE W. VAUGHAN,
Judge, United States District Court.

Filed Sept. 10, 1919. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk. [3]

In the District Court of the United States in and for the District and Territory of Hawaii.

No. 10.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Defendant.

Order Extending Time to November 10, 1919, to Transmit Record on Appeal.

Now, on this 10th day of October, A. D. 1919, it appearing from the representations of the clerk of this court, that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to November 10th, A. D. 1919.

Dated at Honolulu, Hawaii, October 10th, 1919.

HORACE W. VAUGHAN,
Judge, U. S. District Court, Hawaii.

Filed Oct. 10, 1919. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk. [4]

In the District Court of the United States in and for the District and Territory of Hawaii.

No. 10.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Defendant.

Order Extending Time to December 10, 1919, to Transmit Record on Appeal.

Now, on this 10th day of November, A. D. 1919, it appearing from representations of the clerk of this court that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to December 10, 1919.

Dated at Honolulu, Hawaii, November 10th, 1919.

HORACE W. VAUGHAN,
Judge, United States District Court.

Filed Nov. 10, 1919. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk. [5]

In the District Court of the United States in and for the District and Territory of Hawaii.

EQUITY—NUMBER 10.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Defendant.

Order Extending Time to December 20, 1919, to Transmit Record on Appeal.

Now, on this 28th day of November, A. D. 1919, it appearing from the representations of the clerk of this court, and it is impracticable for said clerk to transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on appeal herein on the 10th day of December, A. D. 1919, it is ordered that the time within which the clerk of this court shall transmit said transcript of record on appeal herein, together with all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to December 20, 1919.

Dated at Honolulu, Hawaii, November 28, 1919.

HORACE W. VAUGHAN,
Judge, U. S. District Court, Hawaii.

Filed Nov. 28, 1919. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk. [6]

In the United States District Court in and for the District and Territory of Hawaii.

No. 10.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Respondent.

Statement of Clerk.

TIME OF COMMENCEMENT OF SUIT.

August 27, 1918: Bill in Equity filed.

NAMES OF ORIGINAL PARTIES.

Plaintiff: The United States of America.

Respondent: Frank H. Schurmann.

DATES OF FILING OF PLEADINGS.

August 27, 1918: Bill in Equity.

October 19, 1918: Personal appearance of Frank H. Schurmann.

October 25, 1918: Answer and appearance of Frank H. Schurmann.

January 7, 1919: Motion for continuance.

SERVICE OF PROCESS.

August 27, 1918: Subpoena in Equity issued and delivered to the United States Marshal and filed on return, August 28, 1918, with the following return by the said United States Marshal: "United States Marshal's Office. Marshal's Return. The within Subpoena was received by me on the 27th day of

August, 1918, and is returned as executed upon Frank H. Schurmann this 28th day of August, A. D. 1918, by handing to and leaving with him a certified copy of the Original Subpoena. J. J. Smiddy, United States Marshal. By C. J. Laval, Deputy U. S. Marshal. Dated at Honolulu this 28th day of August, A. D. 1918." [7]

HEARINGS.

October 29, 1918: Proceedings at hearing.

January 7, 1919: Proceedings at hearing.

January 9, 1919: Proceedings at hearing.

January 10, 1919: Proceedings at argument and order cancelling Certificate of Citizenship.

January 18, 1919: Notice of appeal and notice of motion for new trial.

The above hearings and proceedings were had before the Honorable HORACE W. VAUGHAN, Judge of said court.

DECISION.

January 15, 1919: Decree filed and entered.

January 20, 1919: Opinion of Court filed. (Vaughan, J.)

PETITION FOR APPEAL.

July 10, 1919: Petition for appeal and order allowing same filed.

United States of America,
Territory of Hawaii,—ss.

I, A. E. Harris, Clerk of the United States District Court, for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the

above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; and account of the proceedings showing the service of the subpoena and the time when the judgment herein was rendered and the Judge rendering same, in the above-entitled cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 29th day of November, A. D. 1919.

[Seal] A. E. HARRIS,
Clerk U. S. District Court, Territory of Hawaii.

[8]

In the United States District Court in and for the Territory of Hawaii.

APRIL TERM, 1918.

UNITED STATES OF AMERICA

vs.

FRANK H. SCHURMANN.

Bill in Equity.

To the Honorable HORACE W. VAUGHAN and the Honorable JOSEPH B. POINDEXTER, Judges of the United States District Court, in and for the District of Hawaii.

Comes now the United States of America, by S. C. Huber, United States District Attorney in and for the District of Hawaii, and who is authorized by law to institute and prosecute this suit for and on behalf of the United States, and for its cause of complaint against respondent, alleges,—

First. That the respondent, Frank H. Schurmann, is a resident of the city of Honolulu, County of Oahu, District of Hawaii.

Second. That prior to December 17, 1904, respondent was a subject of the Imperial German Government and of William II, German Emperor.

Third. That the respondent on, to wit, the 17th day of December, 1904, in the United States of America, in the State of California, county of Los Angeles, became a citizen of the United States of America by naturalization, and on said day and at said place, a certificate of citizenship was issued and delivered to the respondent out of and by the Superior Court of Los Angeles County, which said Court was then and there a Court of Record having common law jurisdiction and a clerk and seal, and having jurisdiction to issue said certificate of citizenship. A true and correct copy of said certificate of citizenship is hereto attached, marked Exhibit "A," and made a part of this bill of complaint. [9]

Fourth. That before bringing this suit there was presented to the aforesaid S. C. Huber, United States District Attorney for the District of Hawaii, as aforesaid, an affidavit duly signed and sworn to by one Jeannette Ryan (Mrs. John W. Ryan), which said affidavit is hereto attached and marked Exhibit "B."

Fifth. That before said certificate of citizenship could, under the law, be issued to respondent, and before it was issued to him, he was required by law to make oath before the Court issuing said certificate, and did make and subscribe an oath before said Court,

in substance as follows: That he would support the Constitution of the United States of America, and that he absolutely and entirely renounced and abjured all allegiance to every foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government and William II, German Emperor, of whom he had hitherto been a subject, as aforesaid.

Sixth. That the said certificate of citizenship that was then and there issued to respondent as aforesaid was procured by respondent by fraud, in this: That at the time respondent made the oath of allegiance referred to in the next preceding paragraph, he falsely and fraudulently made oath that he absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government and William II, German Emperor; complainant alleges that the respondent did not at such time and place absolutely and entirely abjure and renounce all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government and William II, German Emperor, but did then and there fraudulently reserve and keep in whole, or in part, his allegiance and fidelity to the Imperial German Government, and to William II, German [10] Emperor.

PRAYER.

The premises considered, the complainant prays upon the final hearing of this cause that it be ordered and decreed that the certificate of citizenship hereto-

fore issued to the respondent be set aside and canceled, and for such other general relief as may to the Court be deemed just and equitable.

(Sgd.) S. C. HUBER,
United States Attorney,
(Sgd.) JAS. J. BANKS,
Asst. United States Attorney,
Solicitors for Complainant. [11]

Exhibit "A" to Bill in Equity.

CERTIFICATE OF CITIZENSHIP.

United States of America,
State of California,
County of Los Angeles,—ss.

BE IT REMEMBERED, That on the 17th day of December, in the year of our Lord one thousand nine hundred and four, FRANK H. SCHURMANN, formerly of Germany, at present of the State of California, aforesaid, appeared in the Superior Court of Los Angeles County, the said court being a court of record, having common-law jurisdiction, and a clerk and seal, and applied to the said Court to be admitted to become a

CITIZEN OF THE UNITED STATES,

pursuant to the directions and requisitions of the Act of Congress of the United States of America, entitled "An Act to establish an Uniform Rule of Naturalization, and to repeal the acts heretofore passed on that subject," and of the several acts in relation thereto.

And the said FRANK H. SCHURMANN, having thereupon produced to the Court such evidence, made

such declaration and renunciation and taken such oaths as are by said act required, and the affidavits of the said FRANK H. SCHURMANN and of his witnesses having been made and recorded in the records of this court, reciting and affirming the truth of every material fact requisite for naturalization as required by an Act of Congress of the United States of America entitled "An Act to regulate the immigration of the aliens into the United States," Approved March 3d, 1903, thereupon it was ordered by the said Superior Court of the County of Los Angeles that the said FRANK H. SCHURMANN be admitted, and he was accordingly admitted by the said Court to be a citizen of the United States of America. [12]

IN TESTIMONY WHEREOF, the seal of said court is hereunto affixed, this 17th day of December, in the year of our Lord one thousand nine hundred and four, and in the year of our Independence the one hundred and twenty-ninth.

C. G. KEYES,
Clerk.

(Sgd.) By W. C. Watson,
Deputy.

(Seal) Per Curiam. [13]

Exhibit "B" to Bill in Equity.

AFFIDAVIT OF JEANNETTE RYAN (MRS. JOHN W. RYAN.)

Territory of Hawaii,
City and County of Honolulu,—ss.

JEANNETTE RYAN, being first duly sworn on oath, deposes and says: That she is the wife of John

W. Ryan, living formerly at 1530 Grove St., Oakland, California; that she is estranged from and living apart from her said husband; that she arrived in Honolulu, on December 25th, 1917, on the steamship "President"; that she came to Honolulu as a tourist, and upon her arrival went to the house of her friends, Mr. and Mrs. J. G. Faria, residing on Beretania St., in Honolulu; that she visited Mr. and Mrs. J. G. Faria for two days; thereafter, in looking for a place to live selected and went to Dr. F. Schurmann's Furnished Rooms, No. 175 Beretania St., located at the corner of Union and Beretania Streets; that she took rooms there on December 27th, 1917, and has been living there ever since said date up to and including the present time; that a few days after her arrival, affiant became ill for a period of about three days, did not leave the house; that during one of such days, while reclining on a porch lounge on the Union Street veranda of said building, Dr. Schurmann came up and commenced a conversation with affiant; that affiant asked him whether he had anything to read; Dr. Schurmann then brought out a book written by himself entitled, as nearly as affiant can remember the title, "The War as Seen Through German Eyes"; that affiant told him that she had never read the book, and he thereupon gave said book to affiant to read, also giving affiant some poetry written by himself, entitled, "It's a long and rocky road to Berlin"; that in the course of said conversation, Dr. Schurmann stated to affiant that he was not allowed to sell the book since the war, but that there had been no objection to the book up to the time that the United States

was not in the war, but that he had sent two hundred copies of the book to Australia, anyhow, the week before said conversation; that affiant asked him how he could do that; he thereupon stated that the books had been smuggled out on the steamer leaving about a week previous; that as nearly as affiant can recollect the boat referred to left some time in January; that Dr. Schurmann then requested affiant not to let the book out of her possession or show it to anyone else.

Affiant further says that the reason she paid careful attention to said conversation was because various people had informed affiant that Dr. Schurmann was a German spy.

Affiant further says that she thereupon became curious concerning Dr. Schurmann, and shortly thereafter informed one, F. H. Hartley, who had *been of* the officers on the steamship "President" on the trip upon which affiant came to Honolulu concerning said conversation between affiant and Dr. Schurmann; that at that time Mr. Hartley gave affiant no advice concerning the course of action to be adopted by affiant; that during the following few weeks affiant had many conversations with Dr. Schurmann, during the course of which Dr. Schurmann uniformly exhibited a pro-German attitude and made pro-German remarks, a typical example of which were statements in about the following language, "I see the Germans are licking Hell out of the French to-day," or similar remarks concerning the British; that affiant at no time spoke [14] the German language to Dr. Schurmann, but on the occasion of affiant's first visit concerning the renting of rooms by affiant, Dr Schur-

mann asked affiant whether she, affiant, was a German; that affiant informed Dr. Schurmann that she was not German, but of German descent, although, as a matter of fact, affiant is of Pennsylvania Dutch descent; that Dr. Schurmann then spoke to affiant in the German language which affiant did not answer because she is unable to understand said language.

Affiant further says that Dr. Schurmann frequently stated to affiant that the conduct of the United States in entering the war "was outrageous"; that the United States had no business in the war; that it was England and Germany's war; "that it would be impossible for the Allies to win the war"; that subsequent to the making by Dr. Schurmann to affiant of the above and very many similar remarks, affiant again informed Mr. Hartley concerning Dr. Schurmann's remarks, and stated to said Mr. Hartley that she, affiant, wished she knew whom to inform concerning the above remarks and acts of Dr. Schurmann; that a day or two subsequently, affiant was brought by Mr. Hartley to the office of William T. Carden, an attorney at law, where affiant was introduced to said William T. Carden and Mr. J. A. Balch; that, as a result of said meeting, affiant was hired by Mr. J. A. Balch, acting through Mr. Carden, to watch the activities of Dr. Schurmann, reporting to Mr. Carden all information she had concerning Dr. Schurmann and receiving compensation from said Mr. Carden; that during said period of time extending from about the first day of March, A. D. 1918, up to and including the 1st day of May, A. D. 1918, affiant was employed by the said J. A. Balch to watch and report

upon the activities of said Dr. F. Schurmann.

Affiant further says that during said period of time affiant succeeded in ingratiating herself with said Dr. Schurmann, becoming very friendly with said Dr. Schurmann and his wife, to such an extent that affiant has been a frequent visitor at the home of said Dr. Schurmann and his wife, frequently being a guest to meals at the home of said Dr. Schurmann and his said wife.

Affiant further says that from the said period of time, beginning about March 1st, 1918, up to and including May 1st, 1918, affiant had many conversations with said Dr. Schurmann and his wife; that in all of said conversations, both Dr. Schurmann and his wife exhibited a spirit of strong pro-Germanism.

Affiant further says that in the home of said Dr. Schurmann and his wife, affiant saw a very large German flag and several pictures of the German Emperor, a picture of some German aviator, whose name is to affiant unknown, whom affiant was informed by the wife of Dr. Schurmann was no relation to either herself or Dr. Schurmann, but on the bottom of which picture was a round bow of crepe; that about two weeks ago Dr. Schurmann, in a conversation with affiant concerning said German flag, informed affiant that he was informed that persons found in possession of the German flag or pictures of the German "Kaiser" would be arrested; that affiant thereupon asked him whether he was going to destroy the flag, whereupon Dr. Schurmann stated, "I should say not, I planted it."

Affiant further says that about two weeks ago, Dr.

Schurmann exhibited to affiant a loaded pistol, stating to affiant that he, Dr. Schurmann, carried that gun whenever he went home late at night; that he had gone to the Sheriff of the City and County of Honolulu, requesting permission to carry a pistol, but that permission had been denied, he, Dr. Schurmann, being further informed [15] by said sheriff that if he would be discovered with a gun, he would be far more severely punished than if he had not been refused permission; that Dr. Schurmann further stated to affiant that he was carrying the pistol just the same on the nights he was out late.

Affiant further says that Dr. Schurmann is on very friendly terms, and has numerous private conferences with one Oscar Bernard, a person who has many times stated to affiant that he is French, but is a citizen of no country, who is a very clever architect and artist, and who has further stated to affiant that "he has drawings of many points of interest in the island"; that said Oscar Bernard at all times carries a loaded cane at night; that said Oscar Bernard on one occasion, about two or three weeks ago, stated to affiant that he, Bernard "is Dr. Schurmann's right-hand bower."

Affiant further says that at an informal evening party in Dr. Hayes' living-room, located in Dr. Schurmann's rooming-house, the same building occupied by affiant, on the evening of April 23d, 1918, in the presence of Dr. Hayes, Mrs. Hayes and affiant, the wife of Dr. Schurmann drank a toast to the Kaiser; that Mrs. Schurmann was warned by Dr. Hayes that she

was likely to get into trouble, whereupon Mrs. Schurmann simply laughed.

Affiant further says that about four weeks ago, at the home of Dr. Schurmann, affiant, in a discussion with Mrs. Schurmann, stated, in substance, that it was too bad that the Doctor couldn't sell his books after he had spent so much time in writing them, whereupon Mrs. Schurmann stated, "Oh, we don't mind that, the Doctor will be pensioned after the war is over"; that affiant thereupon inquired by whom, whereupon Mrs. Schurmann said, "By the Emperor, for services rendered the Emperor."

Affiant further says that, about two weeks ago, at the home of Dr. Schurmann, Dr. Schurmann and Mrs. Schurmann, in the presence of affiant, were discussing the matter of Dr. Schurmann leaving the island to prevent his being interned; that, in the course of said conversation, Dr. Schurmann said that he couldn't leave the island unless it was for a business trip; that thereupon Mrs. Schurmann said that he could pretend to go on some business about her father's in Los Angeles; that Dr. Schurmann then said that he would go to Los Angeles and from there his friends there would be able to get him into Mexico; that Dr. Schurmann further said that "he knew Mexico, that he had worked there."

Affiant further says that this morning Mrs. Schurmann stated to her, in the presence of one Mrs. Andy Copan, in affiant's bedroom, that "we are going to Central America."

Affiant further says that Dr. Schurmann has stated to her several times that he is planning to sell out his

belongings and leave the Territory.

Affiant further says that Dr. Schurmann has, during the entire period of time that affiant has been watching him, done a great deal of writing; that she is of the belief that there is some concealed hiding place in or near the rooms used by Dr. Schurmann as his office; that affiant's belief is based, in part, upon the fact that every day between the hours from twelve until two, Dr. Schurmann is in his office with his office closed, and that while he states that he sleeps those two hours, he is always entirely dressed and awake when affiant has had occasion to call him suddenly, and upon the further fact that, despite the fact that affiant has heard Dr. Schurmann tell many persons that he sleeps two hours every day, Dr. Schurmann, on one occasion, informed affiant that he sleeps only [16] one hour, and is resting the rest of the time; that when affiant stated, in substance, that the office was always closed two hours, Dr. Schurmann then stated that he always took a bath, whereas, as a matter of fact, affiant has never seen Dr. Schurmann enter the bathroom of said building during said hours, there being no bathroom in Dr. Schurmann's office. Affiant further bases her belief upon the fact that, for two days subsequent to the seizure of certain books of Dr. Schurmann by govermental officials, Dr. Schurmann remained closeted in his office until late at night and on both of said evenings, Dr. Schurmann was closeted in his office with Oscar Bernard until late at night.

And further affiant sayeth not.

(Sgd.) JEANNETTE RYAN.

Subscribed and sworn to before me this 6th day of May, A. D. 1918.

[Seal] (Sgd.) JOSEPHINE K. STONE,
Notary Public, First Judicial Circuit, Territory of Hawaii.

UNITED STATES MARSHAL'S OFFICE.
MARSHAL'S RETURN.

The within Bill in Equity was received by me on the 27th day of August, A. D. 1918, and is returned executed upon Frank H. Schurmann, this 28th day of August, A. D. 1918, by exhibiting to him the original Bill in Equity, and by handing to and leaving with him a certified copy of the same.

J. J. SMIDDY,
United States Marshal.
By (Sgd.) C. J. Laval,
Deputy U. S. Marshal.

Dated at Honolulu this 28th day of August, A. D. 1918. [17]

Appearance of Dr. F. Schurmann.

DR. F. SCHURMANN,
OSTEOPATH.

Honolulu, T. H., Oc. 18, 1918.

The Honorable HORACE W. VAUGHAN, Judge of the United States District Court.

Sir:

Having been summoned to appear in the District Court of the United States at Honolulu on the 26th day of this month, to answer a Bill in Equity, to deprive me of my citizenship, I beg respectfully to lodge notice of my appearance in rebuttal.

The charges as preferred against me on affidavit of Jeannette Ryan (Mrs. John W. Ryan), in Exhibit "B" are hereby denied by me.

I have the honor to be your obedient servant,

(Sgd.) FRANK H. SCHURMANN.

Filed October 19, 1919, at 11 o'clock and 40 minutes A. M. (Sgd.) A. E. Harris, Clerk. [18]

United States District Court, for the Territory of Hawaii. In Equity. United States of America vs. Frank H. Schurmann. Appearance and Answer. Filed Oct. 25, 1918. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [19]

In the United States District Court in and for the Territory of Hawaii.

APRIL TERM, 1918.

BILL IN EQUITY.

UNITED STATES OF AMERICA

vs.

FRANK H. SCHURMANN.

Appearance and Answer.

To the Honorable HORACE W. VAUGHAN, and the Honorable JOSEPH B. POINDEXTER, Judges of the United States District Court, in and for the District of Hawaii.

I now come and show to your Honors that the bill herein does not contain facts wherein this Honorable Court may take away my American citizenship.

I respectfully submit that the allegations (admitted only for the purposes of argument), in the affidavit of Mrs. Jeanette Ryan, that I, in March, April and May, 1918, made statements which make it appear that I did not wholly give up allegiance to the Imperial Government of Germany or William II, German Emperor, cannot make void the oath which I took in 1904, in the court at Los Angeles, because whatever I did say in March, April or May, 1918, cannot affect my oath made fourteen years ago, and that, therefore, said allegations cannot constitute a fraud.

The presumption is in my favor, that I meant every word and every syllable of my said oath, and I do now say, that I did mean every word and syllable of my said oath and have continuously meant every word and syllable of it, and do now, and will ever mean every word and syllable of it, to my death. [20]

Was there anything or any reason for me to make my oath half-heartedly or fraudulently? Was not the relationship between American and Germany, fourteen years ago, of the best? Was there any German in 1904 entertaining thoughts of making war on America? For this Honorable Court to cancel my citizenship, it must assume and conclude that when I took said oath, that I had in my heart such a thing as "war" or such a thing as war between Germany and America. I respectfully submit, that this Honorable Court cannot so hold, because there is no such allegation in the bill, and because the relationship between the American Government and the German Government was friendly, there could not have existed in my heart any more thoughts for the German

Emperor or German Government when I decided to become an American citizen, when I decided that it would be the best thing for me to become an American citizen, and therefore when I took the said oath, my heart and mind and thoughts were wholly and exclusively of America, of the American constitution and of things American.

Did I not, like any other alien, 1904, cast my lot with America, and is not the presumption in my favor that I took said oath in all sincerity and in a *bona fide* manner, and that that presumption is good until the contrary is shown and proven by words, actions or deed of mine to the contrary, which must have occurred on or about the time I took the said oath? I respectfully submit that this Court cannot so hold because of no evidence whatsoever, and because of the circumstances and conditions in favor of my contention that I took said oath sincerely and in a *bona fide* manner which existed at the time, December 17, 1904.

If Mrs. Ryan's affidavit said that I was so and so on or about December 17, 1904, the time I took the oath, then the bill would have stated a good cause, but not so; it shows that I said things fourteen years afterwards, and therefore I contend, that all these allegations of Mrs. Ryan are immaterial and cannot be held against [21] me in this particular matter. The said allegations and testimony may be used against me as an American, criminally, but not for the purposes of taking away my American citizenship.

Had I offered witnesses to falsify as to the term of my residence in America, as was done in the case of Johannesenn vs. U. S., 225 U. S. 227; or had my

witnesses not appeared in open court to testify in my behalf, as was done in U. S. vs. Nisbet, 168 Fed. Rep. 1005; or had I not resided continuously for the required period as was the case in U. S. vs. Simon, 170 Fed. Rep. 680; or had I not completed the proper time of residence before taking out my first papers, as happened in U. S. vs. Luria, 184 Fed. Rep. 643; or had I had another person to take my oath as was done in U. S. vs. Mausour, 170 Fed. Rep. 671, then I say, my papers should be cancelled; but I did not.

In U. S. vs. Spoher, 175 Fed. Rep. 440, on page 448, the following is found: "That it must appear that fraud was practiced in the very act of obtaining the judgment."

Can your Honors then cancel my certificate of citizenship on the affidavit of Mrs. Ryan, of alleged derogatory statements of mine alleged to have been made not at the time of "obtaining the judgment," but fourteen years thereafter? To make the affidavit against me, should not Mrs. Ryan have stated that I made the said statements on or about December 17, 1904, and not in 1918?

Should not the affidavit of Mrs. Ryan be held in suspicion since she was paid to get evidence against me?

The said bill does not contain plain and explicit allegations against me as was alleged against others of like case, as given in the above cases, and for this reason, it is also demurrable.

(Sgd.) FRANK H. SCHURMANN.

Dated at Honolulu, T. H. October 24, 1918. [22]

BILL.

AND ANSWERING THE SAID BILL, I PRESENT THE FOLLOWING:

I admit the allegations of paragraphs one, two and three.

Answering paragraph four, I beg of this Honorable Court, to allow me to say that I neither admit nor deny that said Jeanette Ryan (Mrs. John Ryan) delivered to U. S. District Attorney S. C. Huber, the said affidavit marked Exhibit "B."

Answering paragraphs five and six, I now say and make oath, that at the time I became an American citizen, I did so without fraud and that I did and for all time, since then, now and forever, adjure all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, particularly the Imperial German Government and William II, German Emperor, and I do now say and make oath, that on the 17th day of December, 1904, in Los Angeles, California, I swore fealty to the Government of the United States of America, and that I made such oath in all sincerity, with my whole heart and before God, our Heavenly Father.

That I have ever since then been loyal to the United States. That I am now a loyal citizen of America in word, act and deed, and that I shall ever support the constitution and obey the laws of the United States of America and that I am ready now and at all times to take up arms in defense of the same.

And answering further the said affidavit, I humbly present to your Honors the following:

1. That my services have been proffered the

United States Government and that I did so previous to the date when we entered the war. That at the time I offered my services I also tendered the services of my daughter—a nurse in the Queen's Hospital, and that I did receive an answer from Washington, dated April 24, 1916, to hold myself in readiness as evidenced by said letter from Washington herewith produced and attached and that I have ever since held myself in readiness for the call. [23]

2. That I became a subscribing member of the American Red Cross Society shortly after we entered the war and that I am still a member of the same in good standing; that I have been active in lodge matters towards the raising of goodly sums of money for the Red Cross and that I have been instrumental through the Moose and Herrmann Sons Societies in the purchase of Liberty Bonds aggregating $1500.

3. That I am personally possessed of Liberty Bonds; that my younger children have been upheld by me in the collection of Thrift and War Savings Stamps; that my oldest boy is now and long has been an active Boy Scout with meritorious credit as a salesman of bonds and stamps, with my assistance.

4. That my three daughters have been married from my house with my consent to officers in the United States Army.

5. That I have taught my children to know no other country but America; that they have been taught by me to respect and love America, the land of their birth; that they have been tutored only in the language of their country, namely. English, the

better that they might be steadfastly bound to America; that my children have no knowledge of Germany or the tenets of Prussianism; that they have proven themselves to be heart and soul with America in this war and that I, their teacher, have surely proved that I did not "fraudulently reserve and keep in part my allegiance and fidelity to the Imperial German Government and to William II. German Emperor," when I became a citizen of the United States of America. And lastly I make oath and say that:

Since I became an American citizen, now, and till my death, that I am still and will be a true and patriotic American citizen. And that I now make public declaration that I voluntarily offer my services in any capacity and under any circumstances under the Stars and Stripes and those supporting it. [24]

AND ANSWERING THE SAID AFFIDAVIT I PRESENT THE FOLLOWING:

1. I beg this Honorable Court to permit me to say that the aforesaid Jeanette Ryan did hire a room in the lodging-house operated by my wife at 175 Beretania Street, Honolulu, on or about the 27th day of December, 1917, representing herself at the time to be a rich California widow.

2. I admit that said Ryan continued to live in the aforesaid premises from the date before stated up to the 1st of May, 1918.

3. I deny that said Ryan lived at aforesaid premises on the 6th day of May, 1918, or on the four pre-

ceding days as sworn to by her in her affidavit known as Exhibit "B" dated May 6, 1918.

4. I admit that said Ryan complained of sickness about three days after she came to our lodging-house and that she did consult me at my studio in aforesaid lodging-house and that she was prescribed for by me.

5. It is admitted that said Ryan was allowed access to my private library in my studio while she was consulting with me and while waiting for treatment. It is possible that said Ryan could have taken the book called "The War as Seen Through German Eyes" from my bookcase and that she could have removed it from my studio, to the Union St. veranda.

6. It is denied that said Ryan was given the book by me called "The War as Seen Through German Eyes" while she was resting on a chair on the Union Street veranda of said lodging-house as quoted in her affidavit.

7. I deny having said to the aforesaid Ryan "I see the Germans are licking hell out of the French" or similar remarks concerning the British. I can recollect that at the time that Mrs. Ryan lived with us my rooms were occupied by French and British roomers principally, such a remark from me would not have been advisable in a business sense. [25]

8. I do not admit having asked said Ryan on the occasion of her first visit concerning the renting of rooms if she could speak German. Her name being Irish and her looks Irish, and our having spoken the English language, and her having come to us from a Portuguese home (J. V. Faries), does not make this likely.

9. I deny emphatically that I ever said to the aforesaid Ryan that "the conduct of the United States in entering the war was outrageous."

10. It is denied that said Ryan ever ingratiated herself with Mrs. Schurmann or with myself and was a frequent visitor to our private home on Alewa Heights and that she was a frequent guest to meals at our home.

11. I do admit to have entertained said Ryan once in a casual way and only once at Alewa Heights. The circumstances of her call being connected with a visit that she the said Ryan had that day made upon the sick wife of Dr. Hayes, our next neighbor.

12. It is not denied by me that I have had a picture of the German Emperor among other pictures of historical people, President Wilson, George Washington, and Queen Victoria, Horatio Nelson and Abraham Lincoln, etc.

13. I do admit having had a German flag together with an American flag and the flag of Hawaii in my possession for years.

14. I do not admit having had the German flag in evidence in my home since our war with Germany.

15. I deny having had a conversation with said Ryan regarding a German flag and of my saying, "I planted it." Such a term is not comprehensible by me.

16. I admit that I did carry a loaded pistol in my handbag for protection from the rowdies of Alewa Heights against whom I had entered a complaint to the police. I discontinued, however, carrying [26] my pistol although in fear and trembling

when I was refused a license from the sheriff of this county.

17. It is admitted that one Bernard (a Frenchman) is living at our lodging-house, 175 Beretania Street, but what said Bernard did say or did not say to said Ryan I know nothing of. Whether he said to said Ryan that he carried a loaded cane and that "he had drawings of many points of interest in these islands," or not, I know nothing. I do know that said Bernard has sworn to an affidavit that said Ryan made improper propositions to him, suggesting that she and he travel together as man and wife.

18. I admit to having had the American and the Hawaiian flags suspended as portiers drapings in my home on the occasion when said Ryan called upon us.

19. I do admit that one of my roomers left a picture of a German aviator among other newspaper cuttings of aviators, British, French and German when he left our home, but I do not know what became of them after they got into the hands of my boys as playthings.

20. I know nothing of any "informal party" alleged to have been held in the room of Dr. Hayes at which my wife is said to have drank a toast to the Kaiser. I do know that Dr. Hayes publicly denied this through the newspaper, heading his newspaper remarks that "Charges against Dr. Schurmann against Mrs. Ryan were made in revenge, because that a certain George Feria had been ejected from her room."

21. I have no knowledge whether or not my wife

ever said to the before named Ryan, "Oh, we don't mind that, the doctor will be pensioned after the war by the Emperor for services rendered to the Emperor." If my wife did say so, I cannot be held responsible for the utterances of any epileptic woman suffering acutely under the [27] strain of mental worry and the bad treatment given her children on their way to and from school.

22. I deny having said in April, 1918, in the presence of said Ryan, discussing the matter of my being interned, that I could go to Los Angeles on business connected with my wife's father and from there have my friends get me into Mexico. My wife's father has been dead many years, but my wife belongs to Los Angeles, California.

23. I have no knowledge as to whether or not my wife said to the aforesaid Ryan, "We will go to Mexico or Central America." I doubt that she ever said so, for she knows that it takes money to travel with a large family and I have no money whatever, making it impossible for me to employ counsel, but I am not responsible for what my wife may have said.

24. It is admitted "that every day between the hours from 12:00 to 2:00 I take a siesta (as osteopaths generally do).

25. I deny that there is some concealed hiding place in or near the rooms used as my studio, which is a large room divided into three compartments and baths.

26. I admit the truth to some extent of said Ryan's statement, "That while he (myself) says he

sleeps these two hours, he is always entirely dressed and awake when suddenly called." I admit that I am never found nude when suddenly called.

27. I deny the truthfulness of said Ryan in that she says that I never take a bath in my studio, "and that as a matter of fact that there is no bath in the studio." I affirm that there is a bath in my studio, and though I have never invited Ryan to a community bath, I frequently bathe in the bath at said studio.

28. I deny the statements in said affidavit that I am pro-German. To the contrary, I am a patriotic American citizen; as shown above. [28]

Dated Honolulu, October 25, 1918.

(Sgd.) FRANK H. SCHURMANN.

Subscribed and sworn to before me this 25th day of October, A. D. 1918.

[Seal] (Sgd.) F. W. MAKINNEY,
Notary Public, First Judicial Circuit, Territory of Hawaii. [29]

Filed Jany. 7, 1919, at 11 o'clock 10 minutes A. M. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy.

In the United States District Court, in and for the Territory of Hawaii.

BILL IN EQUITY.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK H. SCHURMANN,

Defendant.

Motion for Continuance of Trial.

Now comes Frank H. Schurmann, defendant above named, and moves this Honorable Court for a continuance of the trial herein, so that said trial may be resumed in said court at the hour of 10 o'clock A. M. of Monday, January 13, 1919, or until such other time as may be ordered by the Court, and at least until 10 o'clock A. M. of Wednesday, January 8, 1919.

This motion is based upon each and all of the grounds following, that is to say:

1. That up to this 7th day of January, A. D. 1919, defendant herein was unable to procure counsel to represent him in his defense herein for the reason that the members of the bar of the said United States District Court demanded sums of money far in excess of any means or property of defendant to pay the same.

2. That the Honorable S. C. Huber, United States District Attorney, representing the plaintiff herein, stated in open court that the plaintiff has no objection to the continuance herein asked for. [30]

3. That defendant herein is unable to proceed immediately with the further hearing of this cause in the absence of having a transcript of the evidence herein heretofore taken prepared for the purpose of guiding defendant and his counsel in the further defense of said cause.

4. That defendant desires to offer further evidence material to his defense herein, to wit, desires to procure the presence of Mrs. C. H. Hitchcock, a material witness to defense of defendant herein, as well as to procure the presence of sundry and divers other witnesses, all material to the defense of defendant herein.

5. That counsel for defendant requires a reasonable length of time in which to familiarize himself with previous proceedings herein heretofore had and taken.

6. That for the first time since the institution and commencement of this cause, defendant herein on the 6th day of January, A. D. 1919, was, owing to his limited means, able to procure the advice and assistance of counsel learned in the law to represent him in this cause.

7. That the present cause is one of first impression in this jurisdiction and is one of vital importance to every citizen of the United States of America resident in the Territory of Hawaii and within the jurisdiction of this Honorable Court, there being but two other adjudicated cases upon the like subject.

8. That defendant herein has consulted and been advised by C. H. McBride, his attorney, that he has

a good and meritorious defense to the bill in equity on file herein, but has been likewise further advised that in order to urge said defense before the court at least a reasonably short time will be required for counsel to acquaint himself with evidence herein heretofore adduced and [31] in which to find and submit authorities to the Court bearing upon the principles of law involved in the matter in issue between said United States and defendant herein.

9. This motion is made in good faith, with an honest purpose, and simply for the reason of giving defendant a fair opportunity to defend himself of and concerning the matters and things in said bill in equity set forth and contained, and is based upon all of the records, files and proceedings herein, and is not made or intended simply for the purpose of delay, and is likewise based upon the affidavits of defendant herein and C. H. McBride, his attorney.

Dated at Honolulu, T. H., upon the 7th day of January, A. D. 1919.

(Sgd.) FRANK H. SCHURMANN,
Defendant.
(Sgd.) C. H. McBRIDE,
Attorney for Defendant. [32]

United States of America,
Territory of Hawaii,—ss.

Frank H. Schurmann, being first duly sworn, on oath deposes and says: I am the defendant named in and who subscribed to the within and foregoing motion for a continuance: I have heard the same read and hereby swear that each and all of the matters and things set forth and contained in para-

graphs numbered one, two, three, four, five, six, eight and nine, are true; that said motion is made in good faith, with an honest purpose, and is not intended for the purpose of delay, but only to afford defendant a reasonably slight period of time in which to further proceed with the hearing of said cause.

And furthermore affiant sayeth not.

(Sgd.) FRANK H. SCHURMANN.

Subscribed and sworn to before me upon this 7th day of January, A. D. 1919.

[Seal] (Sgd.) WM. L. ROSA,
Deputy Clerk U. S. District Court, Territory of Hawaii. [33]

Affidavit of C. H. McBride in Support of Motion for Continuance of Trial.

United States of America,
Territory of Hawaii,—ss.

C. H. McBride, being first duly sworn, on oath deposes and says: That he is the attorney named in and who subscribed to the within and foregoing motion for a continuance as counsel for defendant in said cause; that he has read the same, knows the contents thereof, and that the matters and things set forth in paragraphs numbered two, three, four, five, seven, eight and nine thereof, are true; that affiant has been consulted by defendant herein who has made to him a full and complete statement of facts concerning his defense to the within and foregoing cause in equity, from which said statement of facts, so made as aforesaid, affiant verily believes, and has so advised said defendant, that he the said

defendant has a good, perfect and meritorious defense in said cause; that affiant was retained by defendant herein at a late hour in the evening of Monday, January 6th, 1919, and has had but exceedingly slight opportunity to consult and advise with said defendant of and concerning said cause; that affiant has had absolutely no opportunity whatsoever in which to acquaint himself with sundry and divers vital and important principles of law involved in a determination of said matter, which said matter is one of first impression in this jurisdiction, there being but two other adjudicated cases upon the same subject; that affiant simply desires a fair and reasonable slight continuance herein for the purpose of familiarizing himself with previous proceedings had and taken in said cause and in which to examine adjudicated cases, authorities and decisions pertinent to a correct decision in said matter with a view of assisting the trial Judge in [34] ascertaining the statuts of the law upon the subject matter of this controversy; that affiant has been informed by defendant herein that the Honorable S. C. Huber, United States Attorney in and for the District and Territory of Hawaii, now present in court, is a witness material to the defense of defendant herein, and has likewise informed affiant that a certain Mrs. C. H. Hitchcock is also a witness material to the defense of said defendant; that affiant herein has been further informed by said defendant that the deposition of one Bernhardt Knollenberg, a witness called in behalf of the plaintiff in this cause, and which said deposition is now on file with the Clerk

of said United States District Court, and which said deposition has not heretofore been opened, submitted or read to this Honorable Court, is material to the defense of defendant herein. Affiant desires to have said cause reopened for all of the purposes hereinabove particularized as well as for the purpose of opening, submitting and reading said deposition in evidence as a part of the defense in said cause; that said motion for a continuance is made in good faith, with an honest purpose, and is not intended simply or at all for the purposes of delay.

And furthermore affiant sayeth not.

(Sgd.) C. H. McBRIDE.

Subscribed and sworn to before me this 7th day of January, A. D. 1919.

[Seal] (Sgd.) WM. L. ROSA,

Deputy Clerk U. S. District Court, Territory of Hawaii. [35]

United States Exhibit "A."

"IT'S A LONG AND ROCKY ROAD TO BERLIN."

(Refrain: "Tipperary")

Words by

DR. F. SCHURMANN

Author of

"The War as Seen Through German Eyes," "Preparedness," etc., etc.

Honolulu, Hawaii.

L. O. M.

U. S. "A."

U. S. Exhibit "A." [36]

"IT'S A LONG AND ROCKY ROAD TO BERLIN."

By DR. F. SCHURMANN

Reprinted by Request

1.

IT'S a LONG and rocky road to BERlin,
Where JOHNNY Bull wants to GO;
He would GIVE many million pounds STERling
To deFEAT his German FOE.
But there's NONE who will reach our dear BERlin,
They HAVEN'T the slightest SHOW!
It's a LONG and rocky road to BERlin,
Where JOHNNY Bull yearns to GO.

2.

THRU the GATES and boulevards of ANTwerp
He WOULD just follow his NOSE,
And to MARCH to his goal shouldn't be MUCH work,
For his PLANS none dare opPOSE.
But he FAILED to reach and enter BERlin;
He WAS a little too SLOW—
It's a LONG and rocky road to BERlin,
Where JOHNNY Bull craves to GO.

3.

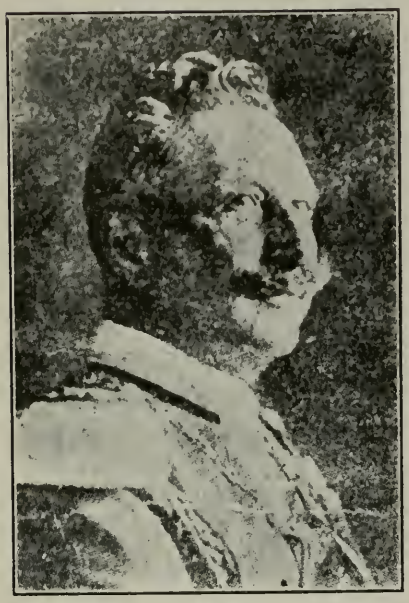
At the DARdanelles he thought he HAD him—
The TURK seemed an easy PREY—
But the STOUT old gobbler he did PECK him,
And JOHN, much hurt, ran AWAY.
By this FLIGHT he missed again dear BERlin.
Thus PASSED his dream of a SHOW,
And it's NOW still harder to reach BERlin,
Where JOHNNY Bull longs to GO.

4.

THEN the CZAR and Czarewitch of RUSSia,
And the KING of England, TOO,
Might have DINED in the capital of PRUSSia,
But HAD no seven-league SHOE.
They will NEVER, never dine in BERlin,
That CITY'S not theirs, you know.
It's a LONG and rocky road to BERlin,
Where KING and Czar want to GO.

5.

Yes, the ZEP-pe-lin is truly FEARful
(Just LISTen how England MOANS!)
It has MADE proud London most unCHEERful,
and RATTLED poor George's BONES.
But there IS a way to get to BERlin,
Thr-u MIST, rain, hail, and SNOW—
It's from LONDON, flying in a ZEPP-lin,
But JOHN is too scared to GO!



Equity #10. U. S. vs. F. H. Schurmann. U. S. Exhibit "A." Song by Schurmann. Filed Oct. 29. 1918. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk.

United States Exhibit "B."

U. S. "B"
U. S. Exhibit "B"

THE WAR AS SEEN THRU GERMAN EYES

A PERSPECTIVE

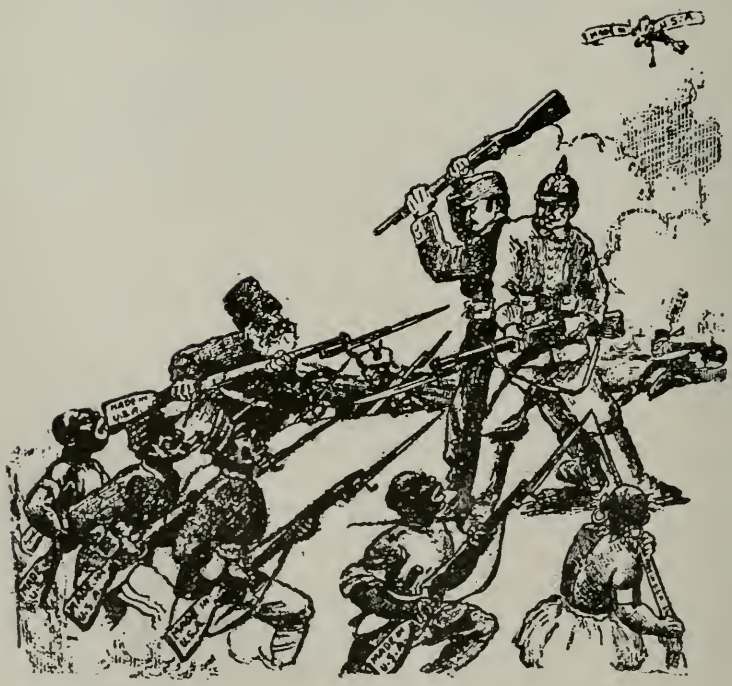
By

Dr. F. SCHURMANN

Author of

"It's a Long and Rocky Road to Berlin"
"Preparedness," etc.

Filed Jany. 6, 1919. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk.



Price $1.25

THE WAR AS SEEN THRU GERMAN EYES
A PERSPECTIVE

Followed by an Addendum which points out the Moral contained in this Review

By

Dr. F. SCHURMANN

Author of

"It's a Long and Rocky Road to Berlin"
"Preparedness," etc.

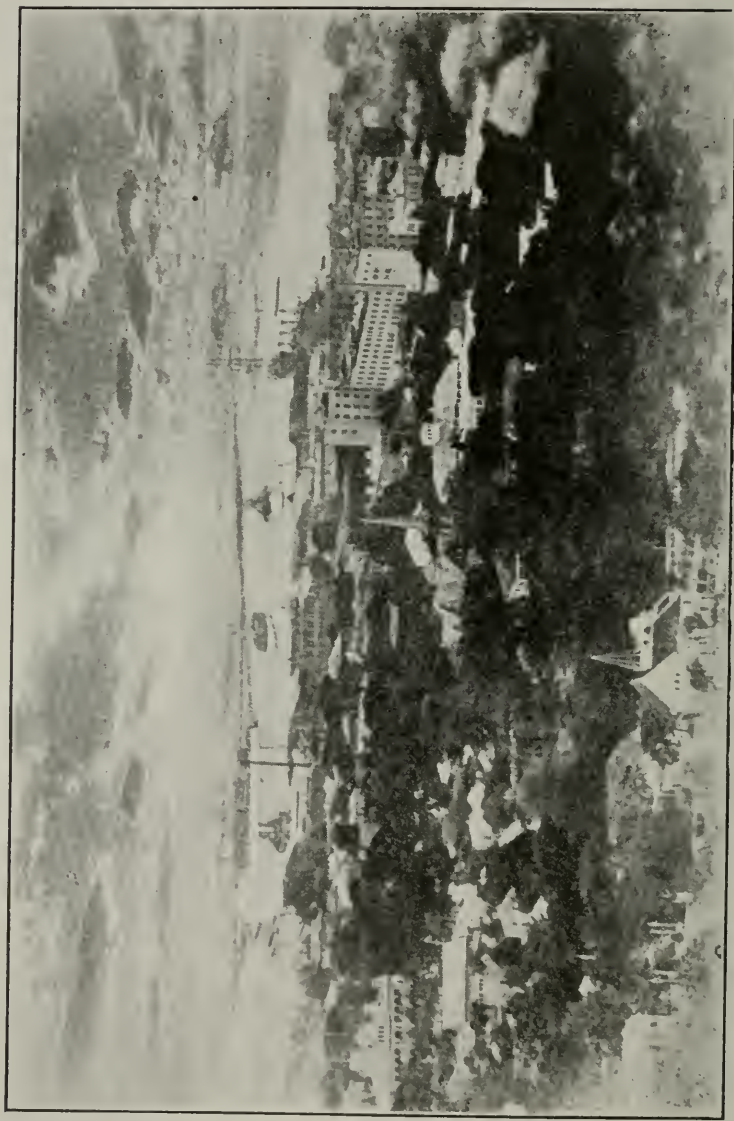
Illustrated.

1916
Press of the Honolulu Star-Bulletin, Ltd.
Honolulu, Hawaii.

I dedicate "The German Perspective" of the great war to all who love the truth and desire to know the truth, so that their minds may be made lucid by the truth.

ILLUSTRATIONS.

POEMS.



Honolulu, the Paradise of the Pacific.

FOREWORD.

A number of my friends requested me to give a talk on the war as viewed through German eyes, as an answer to the lectures recently delivered by the Rev. McCord, the evangelist, at the Opera House, and by Prof. M. M. Scott at the Y. M. C. A. I submitted my manuscript to a few, whose opinion I greatly value, and all advised me not to voice my views in the sacred precincts of the Y. M. C. A., as planned by myself, but to publish them in book form. The object of my friends was two-fold. First, they wished to save me from the humiliation of a possible refusal by the directors of the Y. M. C. A., should they become aware of the gist of my topic; second, they seemed to think that the publication, in book form, of the salient points elucidated in my theme would be more far-reaching than a lecture heard only by a few.

Knowing that the plain facts herein set forth will open the eyes of many who have been deluded by the press, the author is convinced that much good will result from this book. It gives the thinking public an opportunity to form a sane judgment regarding the "RIGHT" and the "WRONG" of the warring nations and regarding the UNREASONABLE ATTITUDE of the United States of America toward the Teutons and hyphenated German-American citizens.

FOREWORD TO SECOND EDITION.

After a brief space of but two months from the compilation of this little volume, a call for a second edition comes from an appreciative public, and I most gladly respond. This new edition is revised and somewhat enlarged, but remains what I meant it to be, "a brief and sincere expression of my feelings and opinions, together with indisputable 'facts' regarding the great international struggle now going on in Europe."

Thanking the American public for its fairness of mind shown by the kind reception accorded "The War as Seen Through German Eyes," it gives me great pleasure to incorporate the following extracts from the many press notices and from the several hundred letters, which I had the pleasure to receive, since the very first day of its appearance.—F. H. S.

Honolulu, August 10, 1916.

EXTRACTS FROM REVIEWS AND LETTERS.

This war is a world matter, not an European affair, and likely to affect the United States as seriously as any nation, if not more. I have been alive to this fact from the beginning of the war—in fact, I apprehended trouble as early as the spring of 1910 and went around the world, seeking where it might break out.

If you had curbed yourself in a few places, your book would have been a strong presentation of the German side.

Executive Chamber,
LUCIUS E. PINKHAM,
Governor of Hawaii.

The speediness with which "The German Perspective" was put through the press amazed me. The book will no doubt be read by many who heretofore have not looked at the war through German eyes. Let us hope that it will help to overcome unreasoning prejudice and bring about greater charity of thought.

Permit me to congratulate you upon the success of the first edition of your work. I trust that the second edition and all later ones will meet with similar success.

FLORA N. ALBRIGHT. [7]

From the "SERVICE," Army and Navy Journal of Hawaii.

Dr. F. Schurmann has just issued a second and revised edition of his book on the war as seen through German eyes, bringing comment up to date. Whatever may be the reader's national obligations, convictions or affections, he cannot fail to admire Dr. Schurmann's presentation of his subject, and will not fail to find in the interesting, well-written pages much that will instruct, enlighten and explain. Whether we be neutral or allied to one of the warring nations, we will profit by a perusal of Dr. Schurmann's work.

New York, Aug. 4, 1916.

From the "Freeman's Journal."

Instead of telling you and our readers what we thought of your book, we are giving it to them to pass their own judgment upon. We know it will be a favorable one.

Success and good wishes for the work you are engaged in.

From the "Gaelic American."

Dr. F. Schurmann published in Honolulu, Hawaii, "The War As Seen Through German Eyes." It is a defense of the hypenated American as against the Tory-British hybrid, and an appeal to fair-minded Americans of all origins to render justice by adhering to true neutrality, instead of allowing the most

flagrant [8] violations of it by those at Washington responsible for the conduct of the administration of the country.

New York, N. Y., Aug. 12, 1916.

Dear Doctor Schurmann:

I have read your "Resume" entitled "The War As Seen Through German Eyes," and I must say that you have dealt with the subject in a way that must open some eyes that are not German. You have placed the whole matter on a basis that must call for a clear verdict from every side, as to the course the German Empire has taken from the start.

The way you have placed the shortcomings of other nations before the world cannot give offense, and should have a tendency to bring about a reformation along certain lines.

Wishing you every success, I am,

Yours truly,

DAVE WALLACE.

Salinas City, July 10, 1916.

Honolulu, T. H., Aug. 12, 1916.

We must face squarely the problem before us: the horrible war, its real cause and the prevention of similar happenings. In order to do this, every viewpoint should be studied. I have read lots of literature viewing the war through British eyes—now comes your book, seeing the war through German eyes. In a community whose sympathies are mainly with the Allies, [9] such a work is very much needed. Your essay will be thoughtfully read by everyone who wishes to hear both sides in order to judge fairly.

MARTHA B. HITCHCOCK.

I expect, with the utmost confidence, that your book will aid, in these sad times, to place German affairs in the proper light. That those lines were written in Hawaii, so far removed from the seat of war, symbolizes the true German spirit which lives in German-Americans.

CAPT. C. GRASSHOF, S.M.S. "Geier."

Your book deserves more than a passing notice and should be circulated by the millions. It justifies your claim laid down in the "Dedication" and will convey the "Truth" to all who are not totally bereft of fair-mindedness and justice. Side by side with the best works of contemporary writings, it will remain a standard essay on the topic of our gruesome but inspiring times.

PROF. P. C. N. DWYER.

An instructive and well-written volume, which should find its way into every American household. I consider the arrival of this excellent book most timely. It is forceful and convincing—in fact, the most lucid work I have read on this subject since the great war [10] began. After reading it my confidence in your great Fatherland, which at times was somewhat shaken (perusing the altogether too numerous anti-Hun propaganda), has now been fully restored. I thank you heartily, that you have permitted me to read the manuscript of your second, enlarged edition. I cannot find anything to criticize in it and deem it simply splendid.

The well-merited eulogy, applied to the men of the

"Geier" (page 68), I consider a special happy inspiration. Success to you and your good work.

"SHAUN O'NEILL."

N. B.—I am forced to adopt a "nom de plume" realizing that otherwise the position I hold would be at stake. * * * This in the land of the free.

To be just; to show a willingness to understand the motives of the German people in their present struggle; to read without bitterness their criticisms of the Allies—these desires I have harbored ever since the beginning of the great conflict.

Now, commencing with paragraph 3 of page 23 (first edition of your comprehensive essay), I am enabled to see the condensed virtues of your Fatherland enumerated, and understand a little of the indomitable spirit that pervades the German race. Everyone should read those paragraphs. In them may be found the elements [11] that go to make the wonderful "Kultur" of the Germans.

Not until I shed a tear at Schumann-Heink's last concert in San Francisco, did I realize that one could love the spirit of each nation in turn, while nevertheless embracing the cause of the Allied powers.

I thank you for your book.

MABEL PUTNAM CHILSON.

"The War as Seen Through German Eyes" has been the means of dispersing a mist which has been gathering before my eyes ever since the great war commenced two years ago. A Frenchman by birth,

though having lived many years in Canada and in the United States, I could nevertheless give no credence to the many reports of German atrocities alleged to have been committed by them. I lived in Berlin, Germany, for about a year, have frequently associated with Germans, have been their guest, ate their meals, drank their beer, played with their kiddies, flirted with their charming girls; know their sterling qualities, their orderly peaceful homelife, and can fully understand the perfect discipline in their army.

Reading, day in, day out, the nonsensical and rascally newspaper accounts of German doings and of German reverses, my mind became gradually clouded by these constantly repeated suggestions, until I finally began to think that after all, there must be fire where there is so much smoke. But your timely book has dispelled [12] the haze and I can laugh at the almost childish (were they not vile) attempts of the pro-British American press to fool the people of the United States. I am studying now daily the maps of the various war fronts, where the so-called "Great Drives" are being made—and am wondering, how on earth, I was so beguiled by the stupid but flaring headlines.

My greatest sorrow is, of course, that my Motherland "La Belle France" has allowed herself to become a catspaw for unscrupulous and greedy England.

I thank you for your "Eye Opener" and believe firmly that all readers of your most excellent work will be blessed with the same realization of the

"Truth," if they are not totally hypnotized, and thereby devoid of their power of reasoning.

OSCAR BERNARD.

Interesting and instructive from cover to cover, it is one of the books which you cannot put down until you have read every page of it.

As a Russian, I will tell you something about the land of my fathers. I and my brothers in exile know that never before has misery and bloodshed been so widespread in Russia as it is now. Never before has the malignant autocracy ruled with such a bloody hand as it does now. Never before has liberty been so completely and hopelessly crushed. Never before has the bloody Czar and his minions been so ruthless. And never before have the "black hundreds" [13] ravished, maimed and maltreated innocent men, women and children as they do now, without any fear of being called to account.

Before, there was a little hesitation in perpetrating acts that were too inhuman and revolting. There was a little fear of the public opinion of Europe. Now this fear is eliminated, because two of the most humane and most enlightened countries are Russia's Allies, and they do not dare to say a word in criticism of the "Bloody Moloch of the North."

Let the feeble-minded and the prostitutes of the press go into ecstasies over the "regeneration" wrought in Russia over the war, I for one, and with me hundreds of thousands of educated and liberty-loving Russians, would prefer "German Civilization" to "Russian Barbarism." We know that by sup-

porting Germany we strike for liberty and enlightenment, but supporting Russia we condone with tyranny and oppression.

I remain with you forever, for freedom on land and sea.

MICHAEL DIMITREVITCH BOROKOFFSKY.

Los Angeles, Cal., July 15, 1916.

It shows very clearly three distinct aims: first, to promote a better feeling between Americans and Germans; second, to expose perfidious England; third, to eliminate President Wilson, because he refuses to place an embargo on the exportation of arms and ammunition.

As a pro-German, anti-English and anti-Wilson [14] propaganda, it is without its rival. Should you later after the peace treaties have been signed, add to your present volume a second part in the form of a correct and concise war chronicle, you will have created a "classic," which will not only be read by contemporary students of history, but also by those of future generations.

I hope that your valuable book will find its way into every library of our land.

Chicago, Ill., Aug. 2, 1916.

TOM CLACEY.

Explanation.—The Author has purposely selected from the hundreds of letters, received by him, a number of extracts which come from those whose sentiments are decidedly for the cause of the Allies. [15]

GERMANY, 1915

By Prof. W. P. Trent, Columbia Univ.

Fronting the world, she stands erect
In valor, strength, and self-respect.
The threats and insults of her foes
She answers grim, with scorn and blows.
In peace, a wisely ordered State;
In war, she shows herself as great;

Witness the drenching blood that stains
Polonian, Gallic, Belgian plains,
While Britain's coasts are specters stare
That leap from sea, or drop from air.

The world ere now such marvel saw
Never, and halts 'twixt rage and awe.
Vain rage! This stark, consummate might
Is grit with adamantine right—
The right to live beneath the sun.
The right to hold what has been won
By toil and science, thrift and art,
In camp and farm, in school and mart—
A right which still without avail
Revenge and cant and greed assail.
Before such prowess rage must sink,
And generous minds be bold to think.
Hypocrisy hath here no place;
Barbarian?—that imperial race?
By Heaven, yon Germany, today
Holding so splendidly at bay
Those variegated tribes of men,
Is not a thing to hunt and pen!

Enough of blind, hysteric fear,
Enough of menace, vaunt, and sneer,
Enough of ghastly tales untrue!
Give the heroic State her due!
Strength to her arm and to her brow
All glory that the gods allow! [16]

AUSTRIA-HUNGARY

By Prof. W. P. Trent, Columbia University.

O land of many tongues, with past
Chequered, and present overcast;
Land of the Danube rolling strong
Its wooded banks and cliffs along;
Land of broad plains and mountains high,
Of wheat and vines and friendly sky,
Where peasants, gay with song and dance,
Suggest a more exotic France;
Land of great capitals renowned,
Vienna, Buda, Prague, the crowned
City upon the Moldau's stream—
Ah, how I see, as in a dream,
Your beauties and your subtle charms
Threatened with dangers and alarms,
With plague and famine and the dread
Barbarian invader's tread!

Hast thou not since the long ago
Suffered enough of toil and woe?
Hast thou not guarded Europe well
From the onsets of the Infidel;
Clifflike amid the mad waves' toss,
O Eastern Bulwark of the Cross?
Hast thou not oft, tho scarce through lust
Of conquest, staggered in the dust
Of sore defeat, and in the gloom
That wraps the Hapsburgs' line of doom?
Couldst thou not turn another page
Of history in this onward age,
And, peaceful, give thy people's laws
And progress, with the world's applause?
Ah, no! before thy portals sate
Incarnate Murder, Greed, and Hate,
And, ere thou shouldst avert the blow,
The crown of all thy hopes lay low!

Then in just anger, deep, not rash,
Thou struck'st, and lo! the armed clash
Of jealous nations answered. Now
Thou battlest with undaunted brow
And hand of steel, while at thy side
Thy great Ally, in all the pride
Of patriotic strength, doth stand,
Faithful, impregnable, and grand! [17]

VENGEANCE!

By Teresa Brayton.

In Dublin town they murdered them,
  Like dogs they shot them down,
God's curses on ye, England, now,
  God strike you, London town;
And cursed be every Irishman,
  Alive, and yet to live,
  Who'll dare forget the deaths they died,
  Who'll ever dare forgive.

In Dublin town they murdered them,
  Who fought for you and me,
These men who dared to back with deeds
  Their dreams of Liberty.
Whose strong hands, clutching England's throat
  Till all her veins ran chill,
Flung round the world a conquering note
  That time can never kill.

In Dublin town they murdered them,
  These men of Irish birth,
Kindly and tender, brave and warm
  As their own Irish earth;
Salt of the salt of Ireland's life,
  Bone of her bone were they,
Like carrion flung in quicklime graves
  In Dublin town today.

Now "eye for eye and tooth for tooth,"
  Be this our battle cry
Though ways run red with hot blood shed
  By men who dare to die.
Vengeance that knows no rest or ruth,
  Vengeance no power can stay,
This is their price of sacrifice
  And we are here to pay.
From North to South, from East to West—
  Whenever England hurled
Our seed of old, we swear today
  To crush her round the world.
To stand as one, to plan as one
  As one to fight or fall
Till they who died in Dublin town
  Are conquerors over all.

They murdered them in Dublin town,
  These men who dared be free
And flung at Freedom's holy feet
  Their lives for you and me;
Then up with this for battle cry—
  Thunder it up and down—
"Revenge"! "Revenge!" "Revenge!" for them
  Who died in Dublin town. [18]

Dr. F. Schurmann

[20]

PART I

THE WAR AS SEEN THROUGH GERMAN EYES.

A perspective, with emphasis placed on the following salient points:

1. Causes of the war.
2. Germany and Prussianism.
3. England and English civilization.
4. Germany's aims in Asia Minor.
5. Violation of Belgium's neutrality.
6. Prowess of German arms.
7. President Wilson's malignant neutrality, and hypocrisy of the United States Government.
8. The descendants of the Tories.
9. The Press, including the two Honolulu dailies.
10. Submarine and aerial warfare.
    (a) The guilty in the Lusitania disaster.
    (b) Armed merchantmen and their guardian angels.
11. Munitions and blood-money.
12. The American clergy.
13. Prophecy.

BEING A RESUME

by Dr. F. Schurmann.

We have all read time and time again about the causes of the war, the progress of the same, and about the aims of the belligerents; all these, however, from the standpoint of England and her Allies. [21]

Many lectures have been delivered on these lines, and perhaps the majority of the people of the United States have attended some of them.

As an American citizen I appeal to your love for fair-play and to your common sense, and I hereby ask your forgiveness should I, during my presentation, offend anyone unwittingly. I mean no offense, and will try my best to avoid giving it.

To start with, I have a confession to make: I am a hyphenated citizen, proud of the land where I first saw the light of life, but equally proud of the land of my adoption, that has given me all the good things which I have enjoyed for over twenty years.

So many harsh terms have been used of late in the United States press, when discussing German-Americans, especially in connection with the land of their birth, that I will ask you this: Is not one class of hyphenated citizens as good as another? If not, why not? If an English-American or Scotch-American or Irish-American evinces his love for the land of his forbears, and places it on par with the country of his adoption, why should a German-American be looked upon with suspicion if his eyes gleam and his heart beats with pride and emotion when he hears and reads of the almost superhuman efforts of Germany's heroic sons and daughters?

Hyphenated Citizens

The man who does not bring to his new country love for his old country, the home of his fathers, brings little that is worth having.

The best that can be done is to talk somewhat in [22] this fashion: "You admire Lafayette, the

Frenchman, who came and fought for this country. Suppose that he had stayed here, and that he, or his son, or his grandson, had seen France at war against four of the greatest European Powers. Do you think HE would have failed to sympathize with France, the land of his ancestry?

Would you not have despised him if he HAD been lacking in such sympathy?

Let any American ask himself the question: "If I were living abroad, in another land, and heard that America were attacked simultaneously by several great Powers, would not my heart go out to America? And what would be my feeling toward those about me in my new country who might say, 'You have no right to be interested in America, since you are here; we happen to sympathize with her enemies, so you must do the same'?"

Many scathing articles have been published in our newspapers, denouncing German-American citizens and accusing them of plotting against the United States Government. In an address delivered by Theodore Roosevelt at Oyster Bay, May 28, of this year, he dramatically proclaimed that the hyphen is the "bar-sinister drawn across our national coat-of-arms." He, and the rest of the many erratic, and flamboyant sensationalists forget entirely that they also are, like all of us Americans, descendants from foreigners or hyphens. They are not honest enough to say that all, that the hyphenated citizens, who sympathize with Germany, have done is to demand from President [23] Wilson and his secretaries and the officials under them, that they should

Roosevelt

strictly and impartially observe the terms of the neutrality proclamation issued by President Wilson himself.

Roosevelt has indeed fully succeeded in cutting short his own public career by his eccentric conduct and foolish pranks. His fiery speeches, no matter how exoteric, were never taken seriously by the people of the United States. In fact, many think of him as a person with an unbalanced mind, and cannot therefore consider him a possible candidate for the Presidential chair. He will be quickly eliminated, if he seeks nomination. By the way, are you aware that President Wilson was the first to use the term "hyphenated" in a public utterance, in order to designate those who differed from him in their sympathies toward the belligerents?

While it is true that a few German-Americans have been carried away by their enthusiasm, and did overstep, in some cases, the strict lines of neutrality, which our President requested us to adopt, it is also true that just as many Anglo-Americans not only did the selfsame thing, but went much further and clamored for and passed resolutions, urging that this, our United States, should enter the war as an ally of England. I want to point out to you that the real and only dangerous hyphenated citizens are the British-American editors and writers of our American press. They are at it, day and night, to inveigle our people into war with Germany. They even attack with tooth and nail individuals and parties who, with their hearts overflowing with pity for suffering humanity, convene and labor on behalf of peace. Those human vipers, nurtured on the [24]

Press Editors

Emperor William, "the Valiant," at the Verdun Front. [25]

warm and trusting bosom of philanthropic "Columbia," are endeavoring in every town and hamlet of the United States—even in our "Paradise of the Pacific"—to sow the seeds of fraternal strife and discord.

Cause of the War

Many writers of note claim that Russia's necessity for obtaining a warm water outlet and her intrigues with the Balkan States are the causes of this war. In my humble opinion, which also voices the sentiment of at least ninety per cent of all Teutons, this is not the true cause of the war, although Russia sorely needs an ice-free port. Others say that if it had not been for France's desire for revenge, this war would not have happened—which is nonsense.

Russia

France

As I do not again in this book mention France and her brave people, I will state, here and now, that the Germans have nothing but the greatest respect and deepest compassion for the heroic sons and fair daughters of that deluded nation.

Militarism

Then we hear that Prussian militarism alone, and nothing else, is responsible. Just as if Russian militarism and French militarism or British navalism could not be equally instrumental in bringing about similar conditions! We read and hear about the Kaiser, that "wolf in sheep's clothing," who, after forty-four years of peaceful work, finally decided to run amuck and show his fangs. This looks to me as if plagiarists have made use of one of Grimm's well-known fairly tales, to wit: "Little Red Riding Hood." Perhaps we may reason that Germany forced the hands of her jealous neigh-

Germany

bors because she needed for her [27] congested shipping more seaports; or perhaps Germany felt tired of life and concluded to commit suicide. What rot!*

What is it, then, that caused this terrible catastrophe? I will tell you, conveying to you at the same time the belief of all the Germans and Austrians, of many Americans, the greater portion of the Irish people, the vast majority of the Chinese, and even of quite a respectable number of Britishers:

England to retain her supremacy at sea and to destroy commercial rival

It was Britain's anxious policy to retain at any cost supremacy at sea and to destroy a great commercial rival. Nothing can explain the causes of the war better than a letter from an Englishman to a Chilean, a copy of which appeared in the German semi-official "Cologne Gazette" of July 11 of this year, and is reproduced in part below. The disgusted recipient of this awful letter turned it promptly over to the "Gazeta Militar" of Santiago de Chile for publication, and its horrible revelations made a deep and lasting impression on its many readers.

Letter to Chile

"Germany had become a deadly poison for British trade. 'Made in Germany' was an intolerable nightmare. Wherever an Englishman wanted to conclude a deal, a German competitor came out victorious, and every manufactured article produced in England would run up against an equally good, or better article manufactured in Germany.

*War cannot be declared by the Kaiser, but is determined by legislative authority, which is vested in the Bundesrat and the Reichstag. The Bundesrat represents the individual states of the German Union (Empire) and is appointed for the session by the government of these states. The Reichstag represents the German citizens and is elected for a term of five years by universal suffrage. [28]

But not England alone suffered from the consequences of German industrial aggression; it had become a universal plague. France, Belgium and Russia also saw how their markets were being cut into; they were being flooded by German wares under such alarming circumstances that they were almost driven to desperation. And it is a fact that it was in these countries, in Belgium particularly, rather than in England, that arose the idea of an alliance to curtail Germany's trade. Before the attack on Liege the Germans did not know how well Belgium was prepared, and today many still foolishly believe in her innocence.

"From the above you can gauge what the future has in store for the Germans. I can assure you that no part of the program of this war was for England something unforeseen, and that, however the fortunes of war may turn out, the result of the war will bring to England profit, and business will bloom here as never before. All the Belgium factories have already disappeared; the industrial districts of France and Russia are laid waste by armies; Germany and Austria-Hungary will remain ruined; consequently, only the English factories will remain to supply the world. There are no grounds for getting excited over the ruin and the desolation that the war calls forth on the continent, for the greater they are, the [29] greater and the more positive will be the advantages for England."

Here at last is a voice which acknowledges the motives of the men who made the war, after all the official hypocrisy. Let us hope that the letter, by rea-

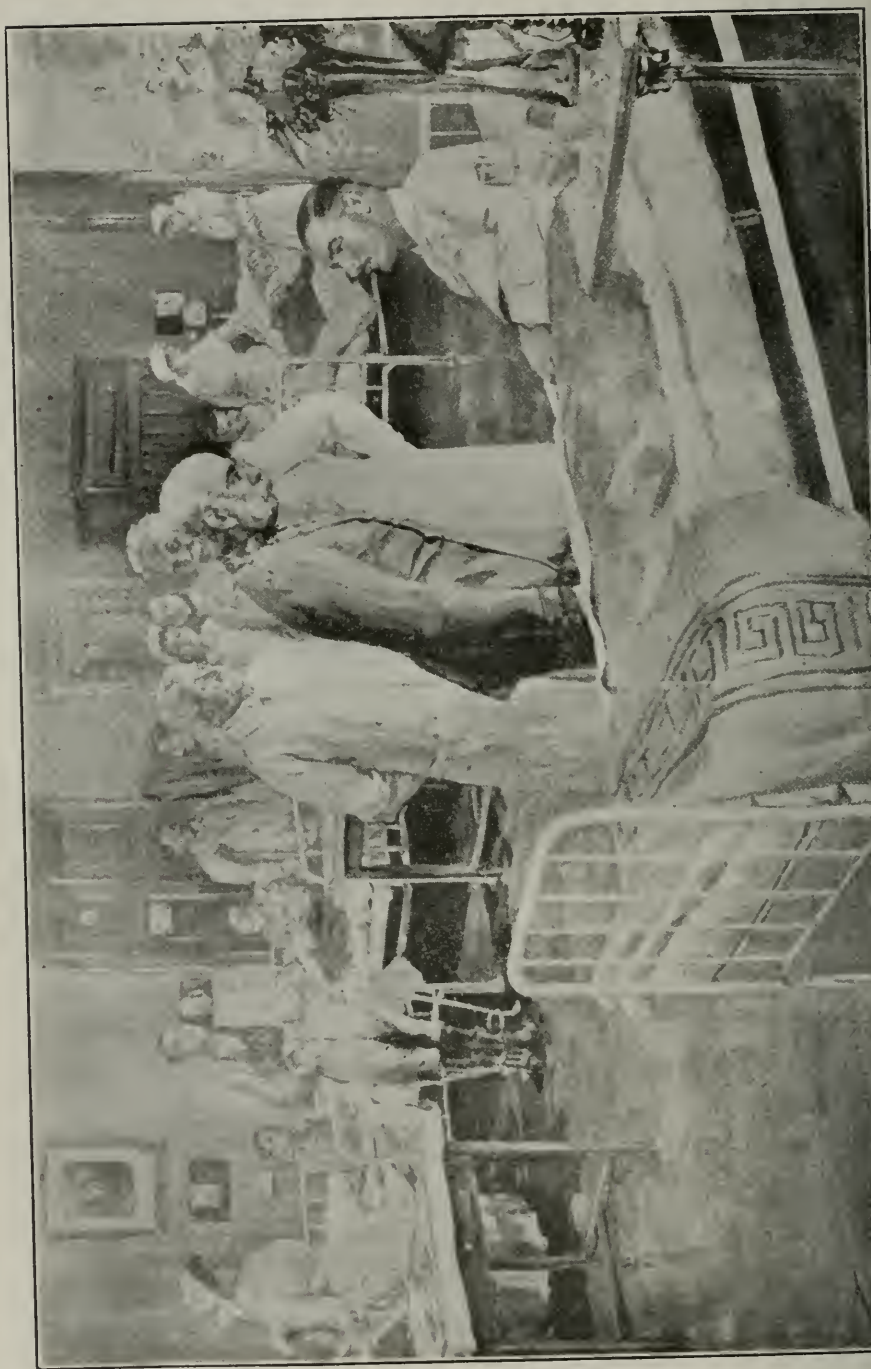
son of its "brutal frankness," will become an important document of contemporary history.

Through her navalism Britain has assailed nation after nation that threatened her trade supremacy; and Germany, the latest menace, is now being similarly handled. Only refer to the histories of Spain, of the Netherlands, of Denmark, of France, and other countries she despoiled with the aid of misguided and hypnotized nations, who, of course, in every instance, pulled the hot chestnuts for her out of the fire. Again the rapacious British Lion feared that a great rival might outdo him in legitimate trade, and again cleverly rallied around him, by means of suggestion and alluring promises, a great array of subservient asses to help him in dismembering, or at least enchaining, the glorious German Eagle.

But even Britain's Allies are now beginning to see the light, and the awful truth dawns upon them slowly that they have been lured into this terrible game of destruction by the fear and greed of England.

Russian Musicians

I have had the honor to entertain at my home Professor P., the leader of a Russian orchestra which is filling a lengthy contract at one of our leading hotels. Professor P. introduced me to the other four members of the aggregation. [30] All five artists are graduates of the St. Petersburg Conservatory of Music, and were, prior to the outbreak of the war, directors of bands and orchestras. Two of them, some years ago, took advanced courses in Germany. They give unstinted praise to that wonderful country of music, art, and science. Three of



the musicians were promptly conscripted when Russia mobilized, and two have seen actual warfare. Both were for months on the firing line, and, though severely wounded, bear no grudge and have nothing but words of praise for their German foemen. One of these artist soldiers was severely wounded in the head by a piece of schrapnel shortly after the capture of Lemberg by the Russians, and was hovering for months between life and death. Professor P. served under the Czar's banner near Warsaw, and fell a victim of gas asphyxiation, which threatened to end his earthly career. Both are totally incapacitated for further military duties, and therefore obtained their discharges from the army, together with their passports. The five gentlemen would consider it a deplorable setback to civilization should Germany be crushed.

Japan

The Japanese, world-famed for their clever juggling tricks, have understood English politics all along. By their innate shrewdness, they have been able to turn the tables on Britain and the other Allies. The result is a great profit for themselves and sorry discomfiture for the others.

The real spirit of Japan toward foreign countries is indicated by an article in a native paper, "Chugai Shimpo," a translation of which [33] appeared in the "Manila Times" of August 31, 1915. This outspoken Japanese paper said:

"It would be lunacy to think that we should want to appear with troops in France. English friendship is to be of short duration. Having attained her purposes, she will quickly discard all who may have gone

to her aid. We have the same rights as England. We regret that we were forced to the sad necessity of siding with her on account of the Anglo-Japanese Treaty. It is beyond all doubt that a treaty with Germany would have been more advantageous and of a much wider scope in the future for Japan. Within a short time grave complications are going to present themselves. We will have to demonstrate that we are a power of the first order, one which is of the same height as England and America, and that in so far as power is concerned we need have no fear of these two peoples. We are, and will be for all time, the masters of the seas of Asia. Our strength will permit the realization of the desires so long cherished, of establishing ourselves on the western coasts of America. We are going to gather great quantities of artillery and ammunition. Today America is supplying the Allies with arms and ammunition against Germany; perhaps the day may come when Germany will supply us against the United States and Australia.

"That which we were forced to undertake against Germany will be forgotten, and it may be possible to so remedy it that Germany will be satisfied; but the moment to discuss this point has not yet come. Everything depends on [34] the triumph of the German armies. It is beyond doubt that Germany and Austria will be victorious, even though other enemies should attack them. We will appear on the day of judgment and prove to the world our full right to call ourselves a civilized nation, from whom the enemies of Germany may take lessons with respect to gentle-

manliness and justice. We have no reason whatsoever to hate Germany; we appreciate her for her greatness and we have no interest in the defeat of that people of heroes, the wonder of the universe."

George Bernard Shaw

In the *London Nation* of February 20, 1916, George Bernard Shaw writes as follows: "Why did we attack Germany? Because we were afraid of her growing naval strength and believed that she would be irresistible if she conquered Russia and France, and thus left us without effective allies. Frightened animals are dangerous, and man is no exception."

Germany's legitimate expansion was not to be tolerated, and, for years, wherever Germany turned for an outlet, she was met by the British (and to some extent by the American) challenge, "Not there!" The present war is a conspiracy fomented by Great Britain to destroy German commerce and German industry. The British claim to own the seas, and desire at any cost to dominate the commercial intercourse of the world.

Boycott Against Teutonic Powers

An event that may prove to be of more far-reaching influence in the world's history than any battle yet fought is the decision of the Allied Powers to combine against German and [35] Austrian commerce. Eight nations were represented at the Paris Economic Conference—Britain, Russia, France, Italy, Japan, Belgium, Serbia and Portugal, and they reached an agreement on June 17th, 1916, as to the policies they would recommend to their respective governments. These measures are of three kinds: first, those to apply during the

war; second, those during the reconstruction period; and third, those to be permanent.

In the first case a complete boycott of the enemy countries during the war was decided upon. The transitory measures for the period of reconstruction after the war are aimed especially to prevent Germany from regaining her commercial ascendency in any of the territory controlled by the Allies. As a permanent policy it was recommended that the Allies take vigorous measures to make themselves completely independent of enemy countries as regards raw material and necessary manufactured articles. The Allies are to improve their mutual means of transportation by land and sea, and of communication by mail and telegraph. A uniform system of patents and trademarks was also recommended.

United States Overawed by English Navy

Is it not a fact that the United States is this very day overawed by Britain's navy, and therefore at the mercy of England? Our nation wants to purchase interned ships, but Britain says, "You cannot do it." Our nation wants to carry on, peacefully, its commerce. Britain's warships, patrolling outside our harbors, deny us the right. The cotton planters of the South are practically destitute, although [36] Germany would, if permitted, enrich them by paying more than twenty cents a pound for cotton. The cotton mills of America are not working to capacity, and England will not permit wool from abroad to be sent to this country, thereby keeping our woolen mills idle, and our men and women out of employment. Our nation desires to carry passengers upon its ships to

Crown Prince Frederick William. [37]

neutral ports, but Britain dictates who the passengers shall be. Our nation desires to send its ships upon the seas without hindrance or search, and Britain fires shots across their bows, hauls down their flags, and takes the vessels into her ports, rummages their cargoes, extracts therefrom whatever she likes, and leaves the remainder to proceed to its destination. Despite the fact that every right of ours upon the seas has been trampled under foot by Britain, the United States, or, rather, certain interests in the United States, are now slavishly furnishing Britain and her Allies with the sinews of war, until the United States has become the base of supplies of the Allies in their war against Germany and her Allies.

Belgium

This war is being supported by sham arguments and hypocritical sentiment. Its pretended cause, "the neutrality of Belgium," is nonexistent. Its real cause is Britain's wish to destroy the German navy. Remember, also, that Belgium was armed to the teeth, and Germany's safety as a nation was seriously menaced by Belgium's bogus neutrality.

Edward VII, Fallieres and the Czar

In June, 1908, King Edward and the Czar met on shipboard near Reval, in the Gulf of [39] Finland, and this visit was followed almost immediately by a rendezvous of the Czar and President Fallieres at the same place. Edward VII and his advisers were the first engineers of the brutal plan to dismember Germany. When Britain thus allied herself with Germany's neighbors, war became inevitable—the peace of Europe was broken by that

act. Britain is a thoroughly commercial nation, with the ethics of an unscrupulous trader. Innately hypocritical, she cleverly concealed her real motives, and announced to the world that her only aim was to destroy Prussianism; and this has become the slogan of an unthinking multitude. The campaign of lying and hypocritical stage-play, that Britain has waged in this war, to convert the feeble-minded to her cause, will stand as a permanent disgrace to her and is a mark of British decadence.

Prussianism

It is not amiss right here for me to explain to you what Prussianism really is. Prussianism is efficiency and justice. It is honest, sincere, earnest, loyal, stern, organic. It is the highest and noblest condition that exists in the world today. True, Prussianism is oligarchic and aristocratic; but why should not the wise and able rule, rather than the foolish and inefficient? Is not the Money Power an oligarchy also? Does it not rule our democracies in spite of our suffrage? Prussianism is a Christian aristocracy—a Spartanism. Prussia inherited the Spartan spirit from the Order of the Teutonic Knights, and the Prussian princes became grand masters of the order. Thus Junkertum is the backbone of Deutschtum. [40] Prussianism has been a great blessing to the German nation by making it wonderfully efficient and united. The Germans are fighting valiantly to conserve their government and their brand of civilization. It would be well for us, if we would examine Anglo-Saxonism and Americanism. Perhaps we might see their close relation to Mammonism! What has become of the

Mammonism

American spirit of fair-play? Has the Almighty Dollar broken the sword of Justice and bound the feet of Liberty with chains of gold?

Militarism We hear so much of German militarism that we need to remind ourselves that militarism is by no means peculiarly German. Neither in the size of its army nor in the presence of a warlike spirit does the German nation enjoy any preeminence over other European nations. Indeed, it would be more just to maintain that the opposite is the case.

The German army does not compare in size with that of Russia, and, for forty-four years after the foundation of the Empire, this army has shown itself to be a very peaceful force.

France has an army approximately equal to that of Germany, although her population is less than two-thirds as great. Her geographical position is a more fortunate one, for she can be effectively attacked by land on one side only.

About British militarism we can only say that no nation is as militaristic as Britain is "navalistic." There is no nation on earth that deliberately holds before itself the ideal of a [41] navy or an army larger than the navies or armies of any two other Powers.

German Army The principal reason for calling militarism German is the admirable organization and great efficiency of the German army. The size of the force has little to do with it. As mentioned before, the Russian army is vastly larger, but it is, like most things in Russia, sadly inefficient, so we

hear little of Russian militarism, and nobody expresses a wish to have it wiped out.

But if German efficiency in military matters makes militarism German, it ought to make all sorts of other things German too, for the same efficiency shows itself everywhere in Germany.

The soldiers we see in Germany are not soldiers by profession, they are citizen guards, who, after two years' daily drill, go back to their homes and take up the peaceful occupations which are to fill their lives. The tens of thousands of soldiers, whom the American tourist sees as he travels about, would be found, could he trace them a year later, or the year after that tilling the fields, mining coal and iron, standing behind counters, collecting fares on street cars, acting as engineers, brakemen or porters on railways, and working as mechanics, bookkeepers, draftsmen, laborers, architects, preachers, surveyors, journalists, school teachers and in all other lines of business. The man whom he sees in soldiers' uniform today will sit beside him tomorrow on the benches of the medical school, with no other thoughts than of his future career as a physician. When he goes to a restaurant for his luncheon, he will be waited on by a man who marched in the [42] ranks a few years back, but who is, and intends to remain, a waiter.

The Germans regard their army as a necessity. The army is very popular, and it is a most democratic institution, because, at the age of 20, every German boy, who is in good health, rich or poor, highly educated or of lesser education, has to join the army, where all stand shoulder to shoulder for a

Cossacks in Full Retreat.

[43]

two years' drill. All these boys will tell you how much good these two years of army life have done them physically and mentally, and that those two years were for them the happiest and most carefree.

The view these boys take of their military duty is this: "Their government assists them in their education and in their business aims, provides for them in cases of accident, furnishes labor on government work to the needy in slack times, and substantially looks after the incapacitated and the aged; in consideration of which they, the boys, gladly take their military training and hold themselves in readiness for the following 25 years to defend against attacks and aggression their country, their institutions and their homes. ONE FOR ALL AND ALL FOR ONE.

The German is a good soldier, just as he is a good mechanic, or a good clerk or a good professor. He is not a blood-thirsty savage. He can be seen filling his leisure hours with the most harmless of pleasures—listening to music, taking walks in the country, feeding the birds in the public gardens. These are surely not the pastimes of professional warriors. [45]

Documents show that Belgium was not neutral

With regard to England and her influence on Belgium (a country with a standing army larger than that of the United States), three documents were found by the Germans in the archives of the Belgian Minister of War, which plainly show that the British Government had come to an understanding with Belgium and France, and had agreed to land troops in Antwerp and other ports in order to attack Germany from the

rear in case of a Franco-German war. One of the documents tells us that as far back as 1906 complete plans, giving full details, were drawn, by which Belgian railroad cars were to be sent to French ports in order to transport British troops into Belgium, thence into Germany. In 1912, when the Balkan crisis became acute, Colonel Bridge, British Military Attache, communicated to General Jungbluth, chief of the Belgian staff, that England was ready to strike, and that 160,000 men were ready to be landed in Belgium as soon as any European conflict should break out. Lord Haldane not long ago acknowledged that the British Government was instrumental in sending General French and his staff, for five consecutive years prior to the outbreak of the war, to Belgium to study on the ground the already planned campaign. On July 25, 1914, M. Saganof, Foreign Minister, said to the British Ambassador at St. Petersburg that he did not believe Germany wanted war, but that her attitude would be decided by the action of the Entente. On August 1, 1914, as reported in the English *White Book* No. 123, Sir Edward Grey was asked by the representative of the [46] German Government whether, if Germany gave a promise not to violate Belgian neutrality, England would do so too? Upon which Grey replied that he could not say that she would. While Belgium pretended friendship and neutrality toward Germany, she was secretly planning her defeat in war. Thus the poor Belgian people must suffer by reason of British intrigue and because of the vain ambitions of King Leopold, of Congo fame, to add to his rather

small country at least the Duchy of Luxemburg. So much for the alleged breaking of Belgian neutrality, by which Germany luckily forestalled her enemies, who had already, for many years, planned the very same thing.

England posing as protector of small nations

The British Government, with a cynicism that is unparalleled in history, has taken advantage of Germany's so-called violation of neutrality for the purpose of raising sentiment against her all over the world, and of posing as the protector of the small and feeble powers. How England has protected small and feeble powers is a matter of her bloody history.

Ireland

Well, there is Ireland—superior civilization gradually worn down by seven centuries of pillage, murder, arson, bribery, poisoning: culture rooted out by imposition of alien language, laws, education, dress, customs, etc., under penalty of death; population reduced to half by famine, while English soldiers took plentiful crops out of the land: manufacturers ruined by laws which robbed them of all reasonable profits; constitution ravished by bribery and force; politicians corrupted; tyranny continuing today [47] as much as ever—perhaps a bit more under cover.

For over a century an Irish Catholic could not sit in the House of Commons; he could not hold any office; he could be a common soldier in the ranks, but he could not hold the humblest office or commission: he could not bring a suit in court; he could not sit on a jury; he could not vote; he could not administer the estate of a friend; he could not practise either

as a physician or as a lawyer; he could not travel five miles from his domicile without a government permit; he could not quit his own dwelling between sunset and sunrise. If a father sent his son to a Catholic school he was fined $100 a week; the schoolmaster was fined $25, and for the third offense was hung.

Lord Chief Justice Coleridge said that the penal laws which were enforced in Ireland were unparalleled in the history of the world.

On Saturday, August 9, 1902, in the City Hall, Dublin, Mr. John Redmond said: "In Ireland there is neither liberty, prosperity nor loyalty. There is oppression and poverty and justifiable disloyalty. We submit to the English usurpation of the Government of Ireland, but we do so because we have no adequate means of successful resistance. We are still an unconquered race, and all the might and gold of England cannot impose her yoke on the hearts and spirits of the Irish people."

A British army of 100,000 men is in hostile occupation of Ireland, while only about 80,000 Irishmen (mostly Orangemen) have enlisted in the British army. [48]

If Ireland today has not the population she had in 1841—eight millions—is England not the cause of it? Ireland has given her best sons to bear the brunt of every English war. The Irish were sold and sent as slaves to Barbadoes; exiled to France and other countries by the thousands, on account of the penal laws.

German Troops Repulse British Attack With Hand Grenades. [49]

Well may George V repeat today the imprecation of George II, when the English were defeated by the "Irish Brigade" at Fontenoy, "Cursed be the laws that have deprived me of such subjects."

Today England needs Ireland's assistance and Irish sympathy, but she has destroyed both forever, in Ireland, in America, and in her colonies.

The injustice done to Ireland in the past was known only to the Irish; today it is known to the whole world, on account of the re-enacted barbarous massacre of Dublin, May, 1916. The massacre of Dublin is only the repetition of the massacre of men, women and children at the fall of Drogheda and Wexford Town, under Cromwell. As it was then, so it is now. The death sentence of the Irish liberators was determined prior to their mock trial. Behold England's wise laws, her twentieth century civilization, her Christianity! Of course she is in a good position to speak of Germany's barbarism!

Instead of the song of a few months ago, "It's a long, long way to Tipperary," the sons of Erin at home, in America, and in the English colonies sing now: [51]

"Too long we fought for Britain's cause,
And of our blood we're never chary;
She paid us back with tyrant's laws,
And thinned the homes of Tipperary.
But never more we'll win such thanks;
We swear by God and Virgin Mary
Never to 'list in British ranks,
And that's the vow of Tipperary."

Then there is India—held through deceiving the guileless natives with great promises of eternally-filled cornucopias. Order restored by means of rifles, taxation, the ruin of industry, famine—countless millions dying under English rule. India

"The Truth About India" is promised American readers of newspapers by "Ram Chandra's News Service," which has its headquarters in San Francisco, according to word sent to residents of Honolulu.

Ram Chandra, the East Indian, who is head of the service, declares in his letters that "three hundred million people in revolt, waging a war for political freedom, breaking the chains which have enslaved them for more than a century, are utterly cut off from the civilized world by the British censor."

"Not a line of the great world events which are taking place behind that veil of secrecy reaches the outside through the ordinary news agencies or the ordinary mails."

Ram Chandra's service, though it baffles the British censor, is absolutely authentic and reliable.

And Egypt—occupied under solemn pledge [52] to get out again almost immediately. Egypt Hands of the clock stopped somehow—so the Britisher finds himself compelled to stay and gather great wealth, not to mention being so convenient to Suez, by which means he can instantly threaten and injure the commerce not only of Germany, but of dear France, and Russia, too. Frequent hangings of Egyptians help to relieve the bore of it all.

South Africa

Farther down, South Africa, conquered by the unflinching British heroism that kept right on despite the sneers of the world, which saw its vast armies routed by about 30,000 active cavalrymen—sharpshooters; finally pacified by concentration camps of Boer women and children—in camps where, according to British admission, 14,000 died of starvation and disease; according to Boer and Irish accounts, over 20,000. Whichever way you look at it, undeniably one of the finest triumphs of British altruism.

Greece

And, by the way, I had almost forgotten little Greece, whose ports and islands were not occupied by Britain or her Allies on account of military necessity. Oh, no, not it!†

Scotland

Or take Scotland—with her brave, foolish people, duped into loyalty which is costing them their nationality, land and language.

Peru

Or wherever English capital goes, as in the Putamayo district of Peru, where the Peruvian employees of English directors were quite unmolested by said directors in their system of driving each Indian captive to the limit, regardless of sex or age, till in a few months death was certain from lashing, maiming, etc., till an Irishman, Sir Roger Casement (now often called "the humanitarian traitor"), who was at that time British Consul in that district of Peru, exposed this hell to the world.

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† The partisan of the Allies does not reason about causes—he feels. His emotions are dominant. Having determined that Germany is to be blamed for the war, he judges every subsequent issue unfairly. Atrocity tales from the Entente side stir his anger, whereas atrocity tales from the German side are hailed by him as undisputable facts. He demands that the United States protest the violation of Belgium's neutrality, but he would consider it silly to protest the violation of Greece's neutrality. [53]

Or take England herself—square mile after square mile of slums, which represent the intensest and most continuous misery, the utmost degradation, the most appalling failure of civilization, to be found anywhere. Her rural population is disappearing; her health and strength, ditto. The scant remainder of her rural population is divided between landlords, who live on the rent; farmers, whose political minds have been ossified into snobbish toryism for centuries; and laborers, who dare not raise a voice in public affairs. Nowhere else, indeed, as they boast, does liberty flourish as in England and her possessions—thank God!

England

Let us now look at the country she wishes to destroy. A land of 208,830 square miles of territory—an area not so great as our single State of Texas, which has 265,780 square miles—where agriculture has been systematically developed and improved until it has reached the highest point of productiveness known in the world, so that Germany can produce almost all the food absolutely necessary to sustain 70,000,000 of people. So intensely has this little section of the globe been worked that it rivals England in the foreign trade of the world. [54]

Germany

Richard M. McCann, editor of "Waterways and Commerce," gives the following facts and figures: "More than 80 per cent of the German railroads are owned by the Imperial—or State—governments. There are more than 2,000 miles of electric railroads, 6,000 miles of navigable rivers, 1,500 miles of canalized rivers and 1,500 miles of canals. The Kaiser Wilhelm or Kiel Canal con-

German Railways

Austrians in hand-to-hand battle with cornered Russians. [55]

nects the North Sea with the Baltic and is 61 miles long, with an average depth to permit the passage of the largest ship. Its cost, upward of $70,000,000, has been more than repaid by the protection it has afforded the German navy.

Germany of all countries of the world has developed its water transportation to the highest state of perfection. Her rivers are not deep, but their channels are in good condition. Her terminal facilities and physical railroad connections at stopping points are of the best. If you will go to that country and visit the Rhine you will see that stream full of barges, from ten to twelve hundred ton capacity each, six, eight, and even more of them linked together and drawn up and down the river by one powerful tug, with perfect arrangement for loading and unloading, and with economic physical connection with the railroads which receive their cargoes and distribute them into the interior.

The waterways of the United States cost the people $100,000,000 annually in taxes and are of negligible benefit of commerce, while the waterways of England are useless.

Profits of Railways, etc.

The railways of Germany pay a profit of $5,000 a mile—what of the railways of the United States? [57]

The expenses of the German Empire are paid by the profits from the postal service, the telegraphs, telephones and state railroads. What revenue does the United States receive from these sources?

So much for the material side of Germany. Let us glance at the mental or educational side. School

instruction is obligatory on the whole people, and the government is liberal to extravagance in the promotion of primary and secondary education. There are 25 universities with 70,000 students. The leading universities are in Berlin, Munich, Bonn, Leipsic, Halle, Heidelberg and Breslau. There are also technical and polytechnic schools, the Naval Academy at Kiel, Military Academy at Munich and Berlin, besides 60 schools of navigation, 15 special military schools and 10 cadet institutions.

And all of this in a territory less in area than the State of Texas. Think of it! there is a reason—and that reason is:

THE REVENUES OF THE GERMAN EMPIRE HAVE BEEN HONESTLY EXPENDED.

There is no other country on earth in which the general plane of civilization is so high! Education is universal and illiteracy is completely stamped out. There are no slums, and prosperity is universal. The sense of duty is the governing principle of life, from the highest to the lowest.

Those who know Germany well are compelled to admit that the German government is a government for the people, and is both just and benevolent. There is rather a wide-spread [58] belief in America, that the Germans, in their own homeland, cannot precisely be called a free people, and do not enjoy those rights of man to which every American thinks he has a claim. But you will find in Germany, faces less anxious than those to which we are accustomed in New York. Travelers, who live for a while in Germany, soon find out what a kindly feeling the

German harbors toward his paternal government. All the various German states hold with enthusiasm to the German confederation. Separate, those states were of no significance and suffered great economic disadvantages. United, they are constituent parts of a powerful nation and enjoy immense economic advantages.

During the first months of 1915 a sum of 600,000,000 marks surplus was paid into the German savings banks, whilst in France, during the same time, 57,000,000 francs more were drawn out than paid in showing that the economic forces of Germany are as great as her military strength.

Germany has contributed many millions of immigrants to the United States, and their blood is now in the veins of over one-fourth of her inhabitants. To look at the history of the Germans, to regard their institutions, to study their books and attend their universities; to meet them in their own land, and witness their peace, prosperity, geniality, good living, love for the arts and reverence for scholarship, to attend their operas, to meet them in business in America; to send your children to school with their children; to see their affectionate home life; to do your banking with them; to buy your beer, ice cream, [59] candies, groceries and delicatessen from them—why, you would think they were civilized people, splendid people. But not so! The English tell us, and the American press echoes, that they are a horde of barbarians, single-minded on putting out the light of the world.

Barbarians

Interned in Honolulu are the little gunboat "Geier," with a complement of 160 officers and men,

and seven German merchant steamers, with a combined crew of 240—altogether about 400 men. They have been here now two years and not one of all these men has ever been in any way in conflict with the police. Everybody in Honolulu has observed and has remarked on the neat and clean appearance and the good and modest behavior of the "Geier" sailors. All the sailors and soldiers in Germany are and behave just like the "Geier" sailors here in Honolulu. There is not one family in Germany, nor is there a German family anywhere in the world, which does not have some one of its members or relatives belonging to the Army or Navy, and this shows clearly that the German soldiers and sailors are not a separate class of men, but a part of all of the German people.

"Geier" Sailors

Public opinion, molded by the American press into English sentiments, has been built on misrepresentations and falsehood, so that now many Americans consider the German cause not only a lost one, but also an unclean and unholy one.

Newspaper Headlines

I see before me great headlines of our daily papers:

"Murder and Rapine."

"Germany's Warfare on the Defenseless."

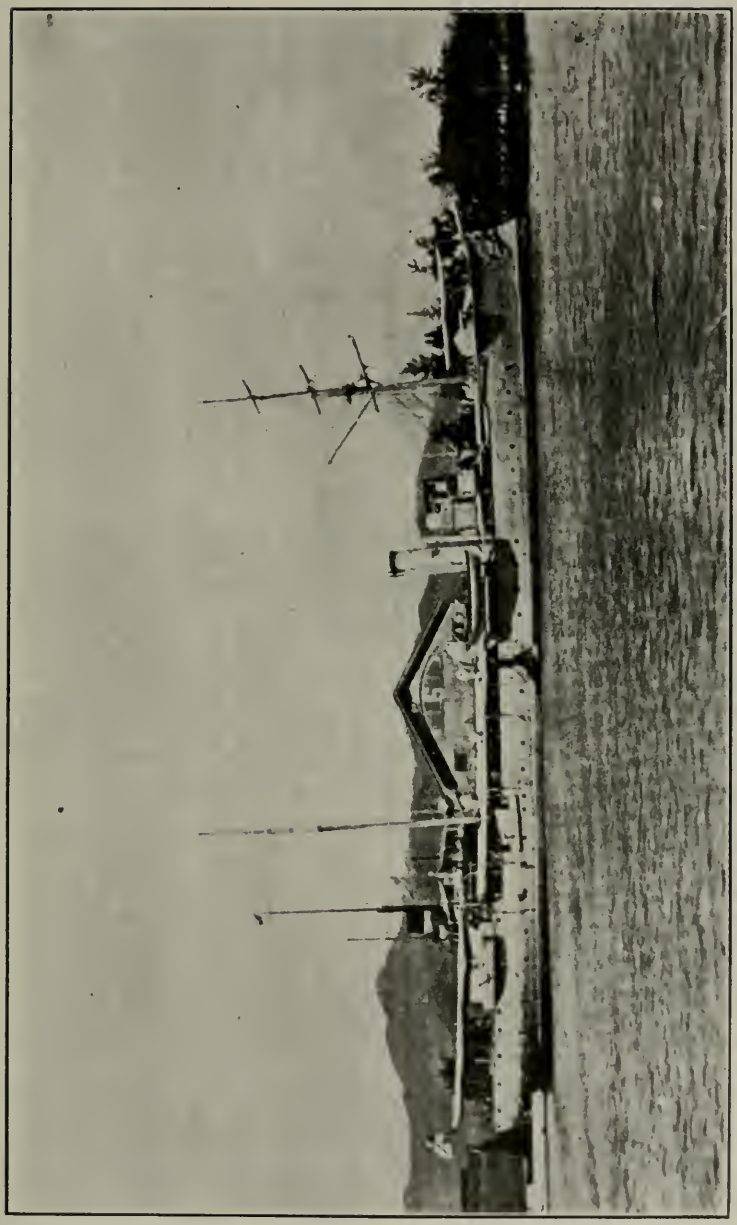
"German Savages." [60]

"Devils and Beasts."

"Huns Cut Off Women's Breasts."

"Drunken Prussian Soldiers Order Belgian Boys to the Block and Chop Off Their Hands."

Such are the headlines of at least nine-tenths of our English-owned, controlled and prostituted press.



The German Gunboat "Geier," interned at Honolulu, Hawaiian Islands. [61]

However, not only the great majority of the intelligent neutrals, but many a fair-minded Britisher shudders and turns away with indignation from the sensational and lying headlines. What some of them think about this war and about the alliance with Russia, the following will show you:

I went, some nights ago, accompanied by an English friend of mine, a man with a great and lofty soul, to a local theatre. Enraptured by the wonderful harmony of an overture, he leaned over toward the orchestra (we were sitting in the "bald-headed row"); and ascertained that the overture was from "Don Juan" and composed by Mozart. He sat in silence for a moment, and then gave utterance to his thoughts: "What a pity that we British should be arrayed against the race which has given us a Mozart, a Beethoven, a Bach, a Mendelssohn-Bartholdy, a Liszt, a Schubert, a Wagner, a Wilhelmi, a Haydn, a Meyerbeer, a Schumann, an Offenbach!" The play was Michael Morton's powerful and well-known Russian drama, "The Yellow Ticket." I watched my friend's countenance, which betrayed his deep emotions, while the drama unfolded itself before our eyes. Again he gave vent to his feelings, saying: "And this portrays the country which [63] we are upholding? Good God, it seems unbelievable that we should be helping to tear down the great German barrier which has for so long protected the world against Russian barbarism."

There is no room for doubt, that America exhibits the deepest sympathy for France. People argue that it is our republican duty to support France;

but I will ask you, is it also our republican duty to support Russia, the most oppressive and outrageous absolute monarchy and autocracy on the face of the earth? Is not the Russian Government the very antithesis of republicanism?

German Railway to Bagdad

Not only with Belgium and France did England scheme and plan for Germany's destruction, in order to further her selfish aims, but with her old enemy and rival, the Russian Bear, which for years caused her so many nightmares. So it happened that in the first days of 1913 Germany discovered Russian military movements from the trans-Caucasus toward Armenia—abetted by Britain. They meant the destruction of the Turkish Empire in Asia and the destruction of German commercial interests therein. These interests of peaceful and legitimate trade, so carefully worked out by the great commercial bodies of Germany, were promulgated in 1898 by the Emperor's visit to Constantinople, and finally concluded in the year 1900 by the granting of concessions to a German syndicate to build and operate railways from Constantinople through the middle of the Turkish Empire in Asia to the Persian Gulf. [64]

Ice-free Port for Russia

England is now going back on her former policy of keeping Russia from an ice-free port, seeing in Germany a much more formidable rival. Therefore, she promises and is willing to give to Russia for her aid in the present war Constantinople and the Dardanelles. What, however, the final outcome for Russia would be, should victory rest with the Allies, we can readily guess. Cunning coalition

would again be formed in order to crush the new and dangerous upstart. History tells us that this course has again and again been pursued by the adroit and unscrupulous politicians of England. Did they not do so with France? Did they not in like manner despoil Denmark, and the Netherlands, and Spain?

Present War Attack of England on Germany

But through the prowess of the German arms, though fighting against vastly superior forces, through the loyalty of her sons and daughters, by her thoroughness and by her efficiency, Germany will not allow history to repeat itself this time.

The people of Germany declare that the present war is nothing else than a long planned and long prepared-for attack of England upon Germany, and they explain it as follows:

For many years there was no Germany. There were 38 states, large and small, in which the German language was spoken, and all of these states together were marked on maps as Germany, but there was no Germany; there was no unison among those states, they quarrelled and fought among themselves. The ruler of each one of these states was an independent sovereign and each one of them had diplomatic [65] and consular representatives all over the world (even in Honolulu).

Bismarck

Bismarck succeeded in overcoming the vanity and false pride of those little sovereigns and he brought about an agreement for a union of all those states, under the leadership of the King of Prussia, whose official title was to be German Emperor.

To prevent the actual carrying out of this agreement, France in 1870 made war on Prussia; but this war turned out to have an effect opposite to France's expectations. The unification of the 38 Germanic states was perfected instantly upon France's declaration of war. Napoleon III had to travel the route that many other monarchs have traveled after defeat in war, and Germany took back from France the provinces of Alsace and Lorraine which had been separated from Germany by France in the year 1681. (Alsace was German from 780–1681, French from 1681–1870 and is German again since 1870).

Franco-German War, 1870

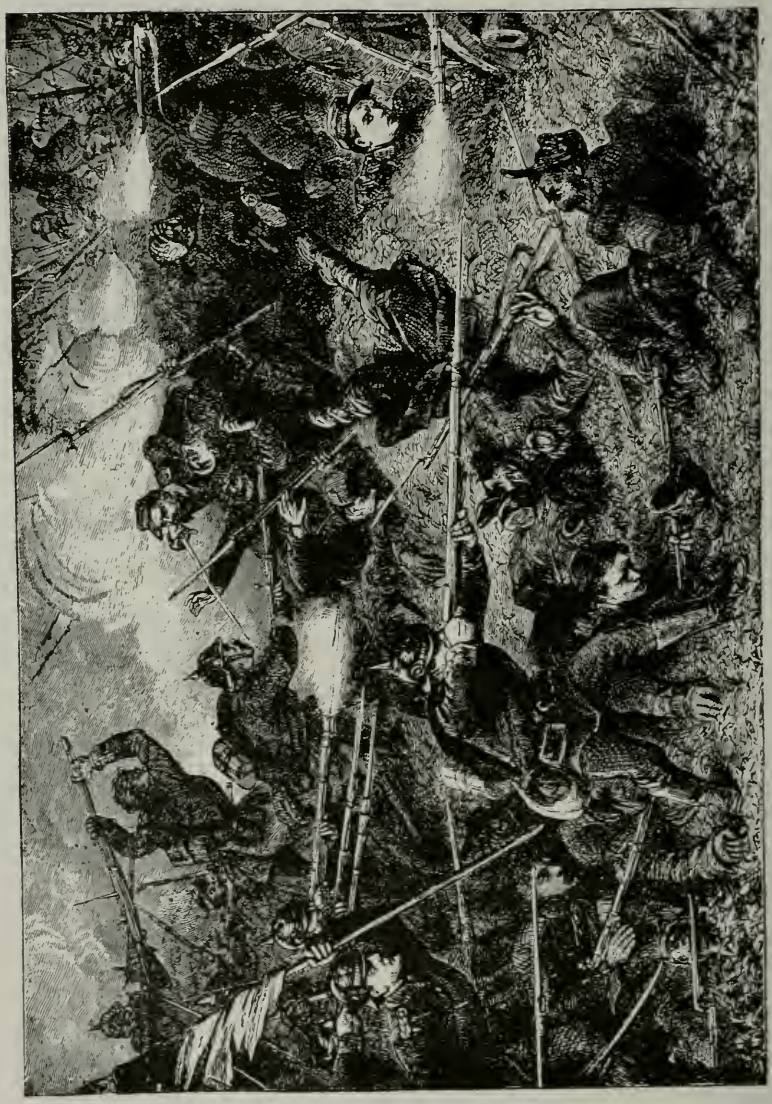
Since then, for 44 years, United Germany has quietly and peacefully pursued its own affairs and has succeeded in building up a large exporting business, thereby detracting considably from the business formerly done by English exporters.

United Germany (Empire)

For the protection of her exporting business, Germany needed a navy and she built a navy. This navy and her exporting business aroused the envy and jealousy not of the English people but of the English politicians and capitalists, who concluded that both the navy and the commerce of the Germans must be destroyed. [66]

("Germany was growing too strong, she had to be knocked down" as one of our Honolulu Britishers, in his terse way of speaking, explains the cause of the present European war.)

By reason of her geographical position, being situated between Russia and France, Germany had



Germans Storming French Position. [67]

to maintain a large army for the protection of her land and her people at home, not against the Russian people and the French people but against Russian politicians and French politicians. Russia, the great, overpowering, sinister, tyrannous, ever-growing Russia, with her theory of pan-slavism, on one side, and France, thirsting to revenge the humiliation of 1870–1871, on the other side, made it absolutely essential that Germany should have an army; and she did build up an army, so efficient and so powerful that no nation would have dared single-handed to attack Germany.

But the English politicians had made up their minds that the German navy must be destroyed, that the German commerce must be destroyed, that the German union (Empire) must be destroyed, and that Germany must be broken up again into its 38 component parts.

Entente

Therefore, shortly after the death of his mother, in the year 1901, King Edward VII arranged England's understanding with France (the Entente cordiale), and thereafter aided in bringing about the mutual understandings (Entente) between England, France, Belgium, and Russia. Further partners to the Entente were sought. With Japan, England already had a treaty.

The alluring prospects of this Entente were: [69]

Spoils for the Thieves

For France, revenge for 1870–1871, and possession of all the German lands up to the western bank of the river Rhine.

For Belgium, the Duchy of Luxemberg, and some of the German colonies in Africa.

For Russia, Constantinople and the Dardanelles, the German Baltic provinces, and the formation of a great Pan-Slavic Empire.

For Japan, Kiauchau with the German sphere of interest in China, and the German islands in the South Seas.

For England, destruction of German navy, commerce, industries and country, possession of German seaports, and of German colonies in Africa.

Italy joined the Entente some time after the war had begun, and prospects for her are Albania and Trieste.

The existence and the objects of the Entente were no secrets. Newspapers of all the interested as well as other countries for many years discussed it freely. Thus Germany and her loyal friend and neighbor Austria, knew what was coming and they, of course, prepared for it, just the same as the Powers belonging to the Entente have been preparing ever since the consummation of the Entente.

Struggle Commenced

Under the leadership of England this matter was brewing and fermenting. The bung popped out of the cask, perhaps a little unexpectedly (by the dastardly murder of the Austrian Crown Prince and his wife), but the bung was out and could not be driven back again. The politicians saw their opportunity to commence the destruction of Germany. France and Russia [70] mobol ized their armies and thus the war commenced.

All of the German people, without exception, claim that England and her Allies attacked them in the midst of their peaceful pursuits of business and hap-

piness; and they are now fighting desperately for the defense of their property, their homes and their families, full well knowing that they have to fight against enemies numbering more than three to their one.

The crushing of Germany—if that were possible—would only mean another war, between England and Russia and France. Remember that France hopes to regain Alsace and Lorraine and Russia not only covets Constantinople but also the Baltic Provinces of Prussia to get control of the sea. England could not consent to place such power in Russia's hands and neither could she profit by the advancement of France. The triumph of the Allies means the continuation of the world war. The triumph of Germany means the speedy establishment of world peace.

Doings of German Navy

Let us now briefly review the operations in the various war zones. What has the German fleet done? The Allies say it has done nothing. The fact is, however, that it has cut the Entente in two. It has prevented the shipping of arms and ammunition from France and England to Russia, and it has prevented the sending of raw material from Russia to England and France. The contest of the British and German navies may very suitably be compared with a prize fight. The North Sea is the arena; the German navy, a nimble and clever [71] youngster; the British navy, a powerful heavyweight, getting old. That the younger German giant will give a good account of himself is confidently expected by the German people.

According to the figures published by the German

admiralty, covering German naval activities during the two years of warfare, England and her Allies have lost more than three times the warship tonnage that Germany and her allied Powers have lost, and in actual number of ships sunk or destroyed the balance is also much in favor of the Germans.

The table given out says that the Entente has lost forty-nine warships of all sizes since the outbreak of the war, with a total tonnage of 562,000. Of these ships, forty belonged to Britain.

The Teutonic loss is given as thirty-seven ships, with an aggregate tonnage of 162,000.

Turning to the merchant marine losses of England and her Allies, the statement declares that in all 1303 merchant ships have been sunk by the Teutonic Powers, representing an aggregate of more than two million tons.

Doings of German Army

What has the German army done? It has freed Poland; it has occupied one-third of Russia's industrial territory; it has conquered and occupied Belgium with its coal fields, Servia with its copper mines, the northern provinces of France with her iron deposits; it has cleaned up Montenegro, and holds a firm grip on Albania—that tempting bait by which England lured treacherous Italy to everlasting disgrace. This was, of course, all done with the aid of Austria-Hungary, Bulgaria, and that wonderful [72] old convalescent, whom efficient German doctors have given a new lease on life—Turkey.

"JUDAS ITALIANO,"
Sells himself for thirty sacks of English gold. [73]

ITALY, 1915.

I

Tear from thy brow the olive wreath
Thy laughter sickens to a leer,
Behold thy honor falls beneath
The hammer of the auctioneer,
Now Cain shall claim thee for his own,
And Judas keep thee company;
Hell, when blackest deeds are known,
Shall hail the name of Italy.

II

These are not Caesar's Seven Hills,
Nor this the land that Dante trod,
A breed of ingrates plagued with ills,
To mankind traitor and to God,
Vesuvius speak with molten lead,
Roll on her plains they fiery seed,
And, do to her a mortal deed,
Wipe out the name of Italy!

III

Oh Holy Father, held in hyves,
They stray too far from out Thy fold,
These hucksters of their children's lives,
Who sold their souls for British gold.
Pray for them, for Thy heart is kind,
And where no mortal eye can see,
Perhaps God's mercy still may find
A spark of shame in Italy.

IV

She gave her brothers stone for bread,
Now through her towns shall ride the Goth,
And ruined valleys drenched with red,
Remind her of her broken troth.
The Teuton thundering through her land
Shall set God's prisoned Shepherd free,
But thou shalt wear the scarlet band
Of England's strumpet, Italy. [74]

How bombastic England came to the rescue of her befooled little Allies everybody knows. Thanks to her, the King and Queen of Belgium have lost their house and home. Thanks to her, aged King Peter is an exile from his native land and, thanks to her, valiant old Nicholas of Montenegro and his wife are fugitives in a foreign land. These are truly pitiful conditions, which cannot fail to serve as a warning to those other nations who so readily accepted and believed in the vain and idle promises of England. So it has come about that Rumania, which was expected to enter the war on the side of the Allies right from the start, hesitated for two years, and sold in the interim to Germany over a million bushels of grain. However, she has finally yielded to the tempting offers of England and Russia.

England to the Rescue of Small Nations

Rumania

For blood will tell. Like her treacherous ancestor, "Judas Italiano," so has its contemptible offspring sold herself into perpetual and disgraceful bondage for some millions of English gold.

Surely, a just Heaven cannot fail to mete out a befitting reward to those vile traitors!

Now Bulgaria is actively hostile, and Greece is sullenly submitting to the occupation of her territory by the Allied forces. Of the five Balkan States, the Allies have so far only one to show for the money they have expended and the armies they have sent to Gallipoli and Salonica. On the other hand, Portugal was a safe [75] bet, and when John Bull whistled, she

Bulgaria

Greece

Portugal

jumped into the ring with her basket full of stolen German ships.

President Wilson's Neutrality

Coming back to America, let us discuss the so-called neutrality of the American President. Is President Wilson neutral? Certainly not. He is strongly pro-British, and I will point out this fact to you.

President Wilson refused to meet Dr. Dernburg, on the ground that it did not coincide with his notion of neutrality to receive agents of the warring nations. But President Wilson graciously received Lord Reading, the London stock broker, sent to the United States to negotiate a loan for the Allies. Two American officers were censured because they were present at a toast to the Kaiser, which was given in German, although they did not understand the German language; but we have not heard that Dudley Field Malone, Collector of the Port of New York, and other Federal office-holders who toasted the King of England and drank to the success of the British Allies at a recent banquet given by Wall Street to the British Commissioners, have been disciplined by the White House. People shake one another by the hand and proclaim, "Thank God, who has given us in these trying times our President, that great man, who is striving so hard to keep us out of the European conflict." I will later show you how he is aiding those who are working early and late to bring about the appalling conditions which a war with Germany would create in our United States. And how could the United States help the Allies in case of war [76] with Germany? with troops? No.

With her navy, while the combined navies of Britain, France, Russia and Italy failed so ignominiously? No answer needed! She is already doing almost all she can to supply the Allies with the sinews of war, and with all conceivable supplies, including our valiant American mules. But while she will receive for this under the present status the coin of Germany's enemies, she would in case of war be compelled, as her share in the conflict to dole out the war supplies free; and it would fall to the lot of us taxpayers to foot the bills and to hand into the blood-besmeared hands of our millionaire munition-makers our honest, hard-earned dollars!

Humane England

Our ears are still ringing with the outcry made by humane and magnanimous England when Edith Cavell was led to her doom. But humane and magnanimous England, which is doing her utmost to starve the women and children of Germany; humane and magnanimous England, which is withholding American condensed milk from Germany's babies; humane and magnanimous England, which is keeping American Red Cross and hospital supplies from the Teutonic Powers, made no protest when her military tribunal sentenced to death the patriots of Ireland.

While I firmly believe that American citizens of German birth will not violate their oath of allegiance, there would be grave danger from those who are not bound by any such oath. Let us be warned by the tragic yet sublime doings in poor Ireland, where a band of 800 [77] poorly armed patriots defied, for a

whole week, 20,000 British troops, fully equipped with machine guns and cannon.

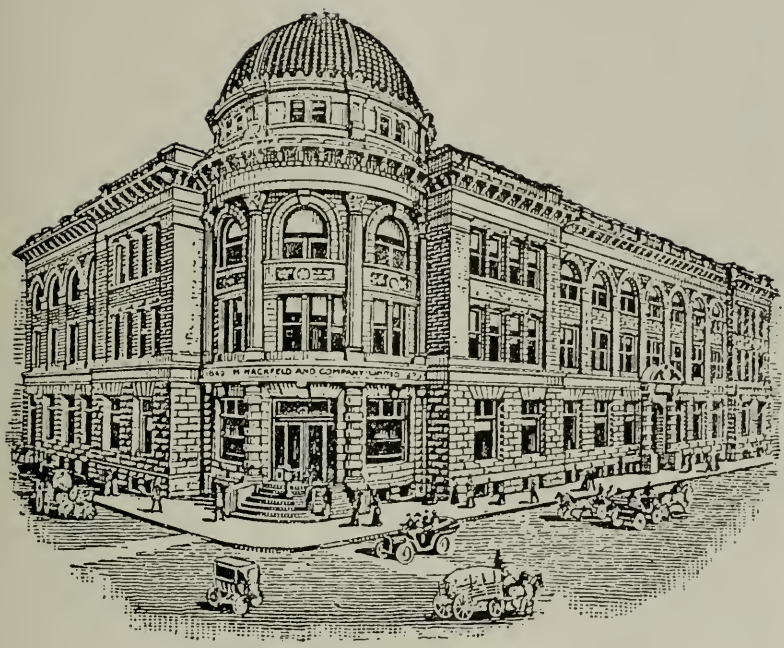
Irish Revolution, 1916

By the summary execution of the leaders of this uprising, England committed by far the most serious of all the many blunders recorded against her, wherever she had control in this war. The whole world knows how she failed at Antwerp, at Mons, in the Dardanelles, in the Balkans, in Mesopotamia, and is now deeply shocked and dumfounded by her cruel and assinine act of sending to the scaffold men whose only crime was unbounded and never-ending devotion to their beloved Ireland. Though they died, their blood will not have been shed in vain, and hundreds of thousands of implacable Irishmen in all parts of the earth will aid to avenge their martyred countrymen, who sacrificed their lives for their righteous and holy cause. The last of them to die was Sir Roger Casement. Unflinchingly at 9 a. m., August 3, he mounted the fatal platform of the gallows in Pentonville jail. His last words were: "I die for my country."

Sir Roger Casement

Before the English tribunal, when the Irish patriot was asked what he had to say for himself, he delivered an eloquent speech and said: "If we Irishmen are to be hanged as murderers, shot as rebels and imprisoned as convicts just because we love Ireland, then I am proud indeed to stand here in the traitors' dock, proud to be a rebel, glad to give my last drop of blood for the rebellion."

Even the most thick-headed of all the blustering and blundering Englishmen ought to realize, [78] that the murder of these patriots will not remain un-



Home of German Consulate in Honolulu. [79]

avenged. Regarding Sir Roger Casement, had he been pardoned or merely been kept in prison for the duration of the war, he would have been forgotten, and perhaps for the remainder of his life would have hung his head sheepishly in some capital of Europe. For the manner of his failure and capture was ludicrous and lacking altogether in heroic dignity.

Now he is dead, and behold, the man who might have been a jest suddenly has been elevated into martyrdom; and in the years to come, when the names of those who are now guiding the destiny of England are forgotten, the name of Sir Roger Casement will be heard over the peat fire. Perhaps his name may become the battlecry of Ireland in some future struggle for her liberty. For the name of him, whom the people believe died a martyr, will live in the hearts of his people forever, and be more potent than Sir Roger Casement could ever have been in life.

Let us hope that the time is rapidly drawing near when an "Independent Ireland" on one side and a "Greater Germany" on the other will keep an effective guard over "Perfidious Albion" and her BLOOD-RED FLAG.

"GOD SPEED THE DAY."

When laid aside the shining steel,
  And mighty guns have ceased to roar,
When Victory's bell shall loudly peal,
  And tyrant rule shall be no more; [81]

When Erin's flag shall kiss the breeze,
  And freemen cheer its every fold,
The despot, beaten to his knees,
  Will cringe to White and Green and Gold!

When German guns shall batter down
  And set aflame "the wooden walls,"
When greycoats march through London town
  And Britain's bloody scepter falls;

When stands exposed before the world
  The Leper of humanity,
And Freedom's flag shall be unfurled,
  Ireland will stand—with Germany.

Let us see what the Father of the United States said about neutrality. Washington, in his farewell address said: "Harmony and liberal intercourse with all nations are recommended by policy, humanity and interest. But even our commercial policy should hold an equal and impartial hand, neither seeking nor granting exclusive favors or preference."

President Washington

Jefferson laid down the rule in the simple proposition that, "The duties of neutrality require equal conduct to both parties at war."

President Jefferson

Many people think that President Wilson was elected by a majority vote of the people. Not at all. He owes his election to the foolish attempt by Roosevelt to create a third party at the last election; and in the shuffle of the three-cornered fight, Wilson happened to receive more votes than either the Republican or Progressive candidate. That is the way he became President. Wilson is

President Wilson

arbitrary, overbearing and fickle-minded. He [82] pays no more attention to the wishes of the American people than he did to the wishes of the teachers and pupils of Princeton University. He is not neutral, he favors England and does all he can to find a pretext to break with Germany.

Mr. Wilson, as an individual, has a perfect right to his sympathy and love for things English, but as President of the United States, it is his irrefutable duty to put a curb upon his sentiments as well as upon every transaction that might be construed as a preference of one of the belligerents to that of another.

Our Next President

The next Presidential election is not far off. Can Mr. Wilson count on the votes of German-Americans, Austrian-Americans, Irish-Americans? No matter of what political partisanship, they would consider it almost a crime to ballot for a man, who has so often interfered with and dictated to a friendly nation. They will prefer even an obscure personality of unknown sentiment, to Wilson, with his pronounced pro-British feelings. Charles E. Hughes, as a strict neutral, in accepting the Republican platform, says: "We interfered in Mexico without consistency, and, while seeking to dictate (to Germany), where we were not concerned, we utterly failed to appreciate and discharge our plain duty to our own citizens." Those are the words of a real American, who will respect and be respected by all friendly nations. It requires no great prophet to fortell the results of the coming election: CHARLES E. HUGHES WILL BE OUR NEXT PRESIDENT!

One of the closest and hottest contests for the Presidential chair is over, and President Woodrow Wilson emerged from it victor by a narrow margin. The American people acted with great wisdom, and those (myself included) who have worked bitterly and hard to defeat him at the polls, began to realize their mistake at the eleventh hour. Without Roosevelt as his "Right Bower," Charles E. Hughes would have had nine-tenths of the German-American and three-fourths of the Irish-American vote, and Wilson would have been beaten. But, God, in His wisdom, permitted Theodore to "shoot off his mouth" in time, and the majority of the deluded partisans of Hughes staggered back from the brink of an awful precipice into safer paths.

Thru the re-election of President Wilson, the American people gave to the world a practical demonstration that they stand for "NON–INTERFERENCE" in the European conflict. They reasoned that Wilson, though of decided pro-British sentiments, has kept us out of war. German-Americans, and Irish-Americans, and all others who have a grievance against Mr. Wilson should not overlook this. They should also bear in mind that President Wilson has gone thru, and is still going thru, the most trying ordeals that any President, except Lincoln, has faced. Should he now remove the cause of the grievance, so paramount with all fair-minded people, to wit: "THE RECKLESS TRAVEL OF UNPATRIOTIC AMERICAN CITIZENS ON MUNITION SHIPS," he would gain the undying gratitude of millions of loyal American citizens.

A manifesto, such as was issued by the British government during the Russo-Japanese war, would quickly and effectively solve this vexatious and vital question.

Refer to side-caption, page 96: "Warning Americans not to travel on English ships." "Warning British not to travel on belligerent ships during Russo-Japanese war." [83a]

Secret Diplomacy and Secret Understandings.

Under Mr. Hughes' Presidency there will be no room for secret diplomacy and secret understandings and secret alliances.

In England and her colonies, and in France and Russia—in spite of all war materials and loans supplied by the United States—feelings run high against the United States. It is claimed that the United States is not doing its duty towards England and her Allies in fulfillment of an understanding (Entente) made some time ago, and which is still in force.

Was it with reference to this understanding when our Ambassador Page said at a banquet in London in February, 1914, "After all, the United States is English ruled and English led"?

Is there a secret alliance? Read the following:

Is there a secret alliance between the United States and England? The question may startle those who have not given the subject of our present relation with the world powers and our statecraft, within the past twenty years, more than perfunctory consideration. It is undeniable that, since the war with Spain, the American Government has turned into new channels of diplomacy and has established more intimate relations with England. Many new things

have occurred since then, which the average American cannot easily explain to himself.

Boer War

During the Boer War we were, officially, on the side of Britain. No European monarchy contributed so freely in official sentiment and substantial material to the defeat of the Boers as we. English officers appeared everywhere [84] in this country to establish camps for the inspection of mules and horses. There were such camps at Kansas City and New Orleans. We supplied arms and ammunition to the English. Every port contained English transports and vessels loaded with supplies for the British army in South Africa. The same outcry of the American element, which is against such shipments, went up then as now. General Pearson, acting for the Boers in this country, declared that if the United States would stop the shipment of mules and guns to the English, the Boer republics were sure of victory.‡

Mass meetings were held and protests launched against the unholy traffic which meant to destroy two flourishing republics; but no attention was paid to these things, while the protestants in Congress, such as Senator Hale, were told to hush up. The same old argument was used: "The Boers have the same right as the English to buy what they want in our markets. We are strictly neutral."

But were we strictly neural? Mr. Joseph Chamberlain, then the English Colonial Secretary, let the

‡It is the Author's opinion, that the great European conflagration would have burned itself out within six months after its outburst, had not the United States supplied the Allies with fuel to keep it going. What a frightful responsibility for the guilty! How many thousands, nay, millions of widows and orphans are being left in sorrow and misery through the greed for money!

Field Marshal von Hindenburg and His Staff. [85]

cat out of the bag in a speech in the House of Commons. He spoke of "an agreement, an understanding, a compact, if you please," between his government and the United States.

English Dictation to United States of America

That the pitiable surrender of American interests [87] to English dictation in all questions affecting our permanent prosperity, our rights as a neutral nation to transact business with non-combatant communities and to foster in peace our trade in non-contraband goods under rules established by long practise and written guarantees, and the dual policy of the administration in dealing with Mexico on one hand and with Germany and Austro-Hungary on the other, and the arbitrary enforcements of rules against German wireless stations and German ships, which are ignored toward English cables and vessels, constitute a policy that rests upon a secret "agreement, or understanding or compact," between Washington and London, is publicly confirmed by Roland G. Usher, Professor of History at Washington University, whose works, "The Rise of the American People" and "Pan-Germanism," are generally accepted as books of authoritative origin.

Prof. Usher, of Washington University

Prof. Usher declares outright that there is a secret understanding between the Allies and the United States, and in his book "Pan-Germanism" he calls attention to specific instances, in which the policy of the United States has been distinctly influenced and directed by this alliance against Germany:

First, that in 1897, there was a secret understand-

ing between this country, England, France and Russia, by which, in case of war brought on by Germany, the United States would do its best to assist the three allies. Second, on page 151, that "certain events give color to the probability that the Spanish-American war was created in order to permit the United States to annex Spain's few remaining colonial possessions." [88] Third, that England possesses three immensely powerful allies—France, Russia and the United States. These he constantly speaks of as the "Coalition." Fourth, that the United States would not have been permitted by England and France to build the Panama Canal, had she not been a member of the "Coalition."

That these are not the idle statements of a sensational pamphleteer is vouched for by the character of the author, and the high standing he enjoys as an American historian. "Pan-Germanism" was published in 1913, and these statements have never been disputed.

If we view the policy of this administration in the light of Mr. Usher's assertions, it becomes clear why we are not neutral and why the State Department is forced to employ every available subterfuge to calm the insistent demands of the English newspapers and public men, as well as the clamor of Prof. Chas. W. Eliot, of Harvard University, Theodore Roosevelt, and others, for active intercession of the United States in the European war on the side of England and her Allies.

Prof. Chas. H. Eliot of Harvard University

For the present our aid is extended only in the shape of guns, cartridges, shells, bullets, powder,

horses and mules, together with all the accessories and trappings belonging thereto, and in war loans. But are we pledged to assist England?

Theodore Roosevelt

We may have good reason to thank Providence that Theodore Roosevelt is not now tenant of the White House in Washington. The Rough Rider's clamorous appeal to the passion of the American people over the so-called violation of Belgian neutrality, is clearly [89] explained by the light of these revelations, for, of course, as ex-President he must have known, all along, of the coalition against Germany, and he must have admitted Prof. Eliot and ex-Ambassador Bacon into his confidence. Prof. Usher was formerly professor of history at Harvard, from which institution Roosevelt graduated in 1880; and there we have some connecting links, from which to form our own conclusions.

This, too, may explain the passage in Bryan's letter to Count Bernstorff of April 22: "That the relations of the two Governments with one another cannot wisely be made a subject of discussion with a third Government, which cannot be fully informed as to the facts, and which cannot be fully cognizant of the reasons for the course pursued."

Will this country be asked to send its sons to shed their blood on the battlefields of France and Belgium for the coalition? And will the day come that will see us sending our ships to the North Sea or the English Channel, to do what the English navy has refused to do? To expose our ships to submarine attacks, so that England may remain the arbitrary

ruler of the waves, and sinister Russia may become the dominating power of Europe?

Are the American people being betrayed? Are they to be delivered hand and foot, boots and saddle, into the hands of England and Russia?

Will the American people and the American Congress demand the truth, or will they submit abjectly like a subject-people to rulers who form alliances without their consent? [90]

Tories

At the time of the Declaration of Independence in 1776, not all people living in the Colonies were in accord with the revolutionists. There were a number of men who wished England's control. These men were called "Tories." President Wilson, in his book "History of the American People," describes clearly the attitude of the Tories at that time, and he also tells how later on they entered into a conspiracy, which had for its object the secession of the New England States from the Union. The descendants of these same Tories, whose ranks have been swelled very largely during the last 140 years from England, are all on the side of England in the present war. The higher-ups among the Tories are members of the Pilgrim's Club, whose principal seat is in Boston, Mass. Two-thirds of the members of this club live in the United States, and one-third lives in England. Immense wealth is owned by these Tories—great savings banks, greater deposit banks, the principal insurance companies, Wall Street, and last, but not least, President Wilson himself. They dictate to and prostitute the majority of the Ameri-

1 2 3

1. Mohammed V, Sultan of Turkey.
2. General Enver Pasha, Minister of War, and Commander-in-Chief of the Turkish Forces.
3. General Liman von Sanders, German Military Adviser to the Turkish General Staff.

can newspapers, including our two Honolulu dailies —especially the "Pacific Commercial Advertiser."

I hope not to transgress in relating to you my own experience with the local press. You may draw your own conclusions therefrom. February 8, 1915, there appeared in the "Pacific Commercial Advertiser" a letter signed "Anthony K. Zwadzki." In this letter Zwadzki accuses the Germans of unspeakable brutalities. [93] Appealing to the editor with the British hyphen, he raved as follows: "What would you do, Mr. Editor, if I were to go to your office and at the point of a gun demand a ransom from you, then go to your home and proceed to insult your mother, wife, daughters or sisters, etc.?"

Pacific Commercial Advertiser

As an answer to this outrageous letter, I wrote as follows: "Highly reputable American journalists have thoroughly investigated the many charges made against the Germans by their bitter and unscrupulous enemies, and have not yet been able to verify one single case of wanton outrage committed against young girls or respectable wives. Stories of ears being lopped off from helpless prisoners, or hands chopped off from innocent babes, were not for a moment given credence by fair-minded and even-balanced people of any nationality. Not a trace of such barbarous outrages was, of course, found—nor ever will be found perpetrated by the warriors (all fathers, brothers and sons themselves) of the contestants in this deplorable war. In the highly disciplined German army, or in the British army, or in any of the armies of all civi-

Atrocity charges investigated by American journalists

lized countries, anything like the above would be summarily dealt with; and a firing squad would quickly and relentlessly end the career of any miserable miscreant, who would even suggest such a thing.

"Mr. Zwadzki, was your mother, wife, sister or daughter outraged by Germans? Did you personally see those brutish acts committed? Did you perhaps indulge, a little too [94] much, in the cup that cheers, and are now sorry for your foolish rantings; or are you hysterical and not quite responsible for your writings; or are you (what I am loath to think) really a mischiefmaker, who is striving to sow the seeds of discord in this Isle of Peace? Let me hope, Mr. Zwadzki, that you have only been thoughtless in your utterances, and I will gladly shake hands with you. I sincerely pray that you may become endowed with a better understanding, and that you will assume in the future a more charitable and christian-like attitude, and not add to the already too numerous 'CRIMES OF THE PEN.'"

My letter not appearing in the paper, I made inquiries and was told that it was in some unaccountable manner lost. A copy was promptly sent by me, and, vainly waiting a week for its publication, I demanded an explanation, and was told that the letter would have to be laid over for a few more days for lack of space. A month elapsed, when a business agent of the "Advertiser" called on me to inquire why I had withdrawn my card from the paper. Very frankly, I told him that I would not entertain future business relations with an organ which had slighted me so unwarrantedly. The agent went to

his master, the British-hyphenated editor, for instructions and returned to me the next day with one of the blandest lies ever told. He said that the German Consul had requested the editor not to publish anything from either a German or a German-American.

Lie, the blandest ever told

I then tried two other publications and met [95] there also with failure. So much for the fairness of the American press in Honolulu.

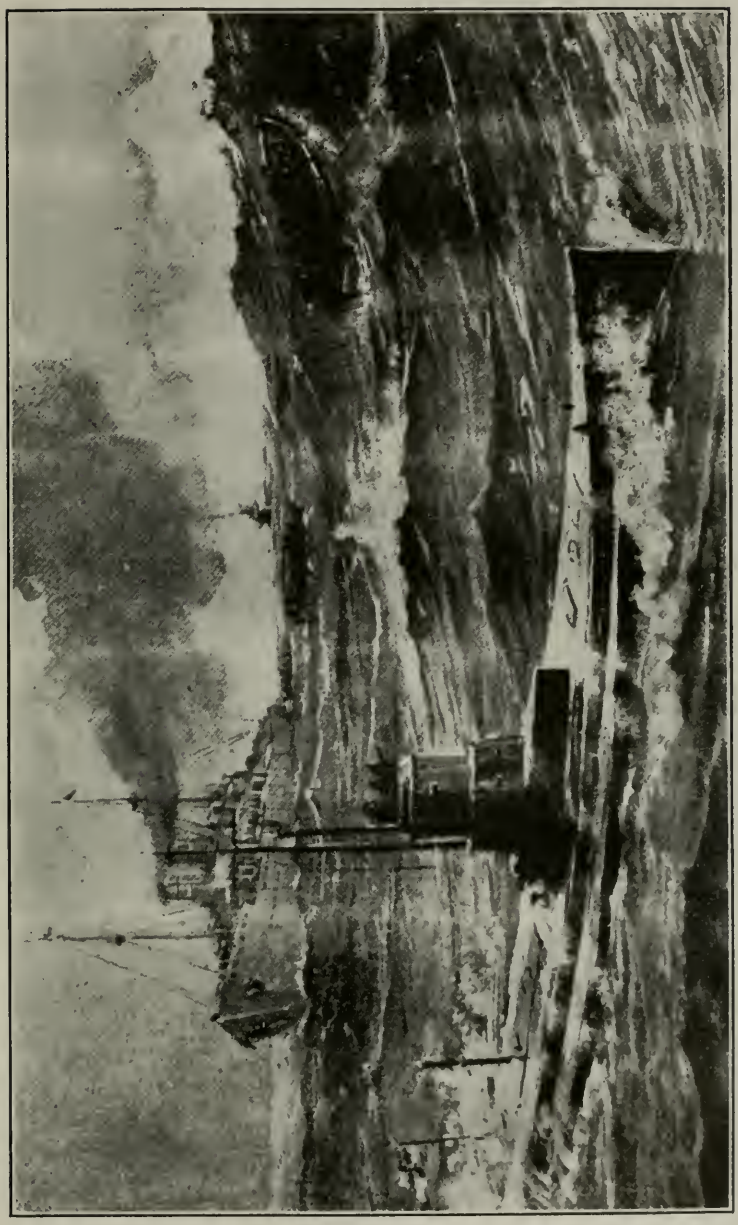
The Press

While the American press is filled with hysterical Jingoism, the German press has maintained its dignified reserve and its wonderful poise.

Now to come back to President Wilson and current politics. On March 3 and March 9, two resolutions were introduced into Congress, which provided that American citizens should be warned not to travel on ships belonging to England and her Allies. As a precedent, reference was made to the Russian-Japanese War, at the commencement of which, Britain promptly issued manifestos, warning her subjects that they would travel on the ships of the belligerents at their own risk. The following official order was issued by the British Consul at Shanghai, China: "All subjects of the Crown are notified that the British Government will not undertake to be responsible for the safety of any of the British subjects leaving this port on a ship of either of the belligerent nations." The President at first invited full and free discussion of the matter, but quickly changed his mind. [96]

Warning Americans Not to Travel on English Vessels

Warning British not to travel on belligerent ships during Russo-Japanese War



German Submarine After Torpedoing Two British Ammunition Carriers. [197]

THE HYMN OF THE LUSITANIA

(Translated from the German by Edith Wharton.)
The swift sea sucks her death shriek under
As the great ship reels and laps asunder;
Crammed taffrail-high with her murderous freight
Like a straw on the tide she whirls to her fate.
A warship, she, though she lacked its coat,
And lustful for lives as none afloat.
A warship, and one of the foe's best workers,
Not penned with her rusting harbor shirkers.
Now the Flanders guns lack their daily bread,
And shipper and buyer are sick with dread;
For neutral as Uncle Sam may be,
Your surest neutral's the deep, green sea.
Just one ship sunk with lives and shell
And thousands of German graycoats—well!
And for each of her graycoats, German hate
Would have sunk ten ships with all their freight.
Yea, ten such ships are a paltry fine,
For one good life in our fighting line.
Let England ponder the crimson text:
"Torpedo, strike and hurrah for the next!" [98]

By trickery and gag-rule, only very little discussion was allowed and the bills were killed. From gleanings of what was done in Congress, from exchange of letters between the President and Senator Stone, and from public documents, the following stands out clearly: That there are coming to the United States, English, French, and Italian steamers, armed with four-inch and six-inch guns, and that these guns are served by first-class naval gunners. These steamers carry arms and ammunition to Europe, and also such passengers as wish to go. But besides the ordinary passengers who pay their fare, such steamers hire two or three Americans, who, for high remuneration, travel on the ships as protectors and guardian angels —and it is now these guardian angels that practically all the present excitement is about.

Armed Merchantmen

Let us now go back to November 6, 1915. The Department of State then discussed what "armed for defense" might mean, and thereupon sent out on January 18, 1916, a note to all Powers in which note it said that it seriously considered instructing its officials to treat such steamers as auxiliary cruisers. Thereupon the German government on February 8, 1916, gave notice that its submarines would attack and sink, without warning, all armed steamers, wherever encountered.

Quickly and effectively the Tories, the munition manufacturers and the British Ambassador went to work, then presto change, President Wilson flopped round entirely.

For a submarine to give warning to any armed ship would be suicidal, and being unable to know the

innocent from the guilty, she cannot therefore run the risk of immediate destruction. For this reason alone, the United States should treat armed ships for what they really are—auxiliary cruisers.

The "Lusitania"

I will now touch very briefly the Lusitania case. Who are those guilty of this terrible calamity? First, the shipowners, who knew that their vessel was laden to the decks with arms [99] and ammunition, and who knew that submarines would lay for her. Next, the United States government, which did not take prompt action to prevent anyone from sailing on this doomed ship; and finally, the reckless passengers themselves, who disregarded the often repeated and earnest warnings, not only published by the German authorities, but also sent by the German authorities to each of these passengers individually. War is no funny business, and a warning given at such a time should not be trifled with.

The passenger list of the "Rotterdam," a Holland-American liner, showed on one of her recent trips, how 75 per cent of her first-class passengers were English subjects bound for New York and Canada. Why did they travel on a boat belonging to a neutral nation? Why should it be safe for Americans to travel on British boats, when the British, knowing it to be dangerous, very sensibly travel on other boats? If it is safe for Americans to travel on British boats, why not for British?

Submarines

Now place yourself in the position of a commander of a submarine who sights a ship, which he knows carries 5000 cases of munition on board, amounting to several million rounds of

cartridges. These cartridges are to be delivered to the enemies of your country, so that they may kill and maim tens of thousands of your kith and kin, perhaps your brothers or uncles or sons or father. I ask you in the name of common sense, would you for a moment consider the fifteen hundred strangers on that ship? Would you let that ship go, even should you not have received orders from your superiors? [100] I know that you, like myself, would not hesitate a moment to take recourse to that greatest of all laws —the law of self-preservation.

In his recent address to the Reichstag, Chancellor von Bethmann-Hollweg said on the submarine question as follows: "No fair-minded neutral, no matter whether he favors us or not, can doubt our right to defend ourselves against this war of starvation, which is contrary to international laws. No one has a right to ask us to permit our arms of defense to be wrested from our hands. We use them, and must use them. We respect legitimate rights of neutral trade and commerce, but we have a duty to perform; and this duty is our right—to use all means against this policy of starvation, which is a jeering insult not only to all laws of nations, but also to the plainest duties of humanity. We fight for our existence and for our future. For Germany and not for territory in a foreign country, are Germany's sons bleeding and dying on the battlefields. Every one among us knows this, and, knowing it, our hearts and nerves are made stronger than ever before. This moral force gives us the determination not only to weather the

storm, but also to achieve final and complete victory."

Airships

But why make all this fuss about the submarine and overlook the other new and terrible weapon of modern warfare—the military airship with its death-and-destruction-dealing bombs and other missiles so often rained upon non-combatants in open towns and hamlets? If you have not studied this out, I will tell you! Because the airships of the Allies can [101] hold their own very fairly against those of the Teutons, but the German submarine is infinitely superior to theirs—that's why the hyphenated Britishers squeal; that's why the pro-British President of the United States squeals, and that's why the descendents of the Tories squeal.

Day of Prayer for Peace

While shortly after the declaration of war a day of prayer was set apart in our United States to invoke the Almighty to bring about a speedy peace, the Tories and munition makers increased their ungodly trade in murderous agents, so that they put out and are selling at the present date about one million dollars worth of munitions of war every day, including Sundays. Quite true, that the inconsistency in principle exists, that a neutral government may not furnish ships of war to the belligerants, but may allow its subjects to furnish guns and ammunition, which give to vessels their formidable character as ships of war. The permission to its subjects of furnishing arms and ammunition to belligerents is the *right* of neutral governments, not the *duty* of neutral governments to the belligerents. Neutrals may furnish or may not permit, as they choose.

ALMOST HALF A BILLION DOLLARS.

Export of Ammunition

This is the value of exports of ammunition, explosives and firearms shipped from the United States in the 21 months of the European war from August 1, 1914, to April 30, 1916. And the war is still going on.

Figures compiled by the Iron Age, and reprinted by the New York Journal of Commerce [102] show the various items comprising this huge figure to be divided as follows:

Cartridges, $44,271,750; gunpowder, $127,767,170; other explosives $195,649,764; firearms $22,473,934; and unloaded shrapnel and shells (estimated) $100,000,000. The astonishing growth of this branch of our export trade, due to the war, exclusive of unloaded shrapnel and shells, has arisen from less than $300,000 per month to approximately $58,000,000 per month.

"The aggregate of exports of ammunition, explosives and firearms," continues the article, "is $390,162,618, of which $188,475,063, or nearly one-half, was shipped in the first four months of the current calendar year.

Germany's attitude during Spanish-American War regarding exportation of arms and ammunition.

During the Spanish-American War the German government took particular pains to prevent the shipping of arms and ammunition to Cuba. In those days there was no wireless telegraphy. A steamer, laden with arms and ammunition had sailed from Hamburg. The German government immediately after the declaration of war, sent faster steamers after her and, overtaking her almost within sight of

Czar Ferdinand I, of Bulgaria. [103]

Cuba, brought her back to her home port. This is fully described by the Secretary of Commerce and Labor during President Taft's administration, and by the Hon. Andrew D. White, then United States Ambassador to Germany, in his autobiography, (1905) volume 2, page 167.

There is some curiosity as to the basis of the recent statement made by the Secretary of Commerce to the effect that our current shipments [105] of war material constitute but 10 per cent of our exports. As a matter of fact, our exports of ammunition, explosives and firearms alone have amounted to about 15 per cent of our total shipments of merchandise of all classes, and when to this total are added such of our exports of iron and steel, automobiles, saddlery, harness, boots, shoes, clothing and food products as are strictly classified as war material, the absurdity of the secretary's statement is clearly apparent.

Embargo on Export of Ammunition

Why did we not immediately, after the outbreak of the war, place an embargo on the shipping of arms and ammunition to the European nations, and treat those belligerents as we are treating the warring factions of Mexico.§

Chas. R. Bryson, president of the Electro-Steel Co. of Pittsburg, Pa., says:

"We believe that the time is at hand when any individual who accepts a contract to further add to the horrible slaughter now going on in Europe, will do so to his own everlasting disgrace."

§ Intervention in Mexico would have taken place long ago, if that could have been done without stopping the sale of ammunition, arms and other supplies of war to the Allies for their use against the Central Powers.

Mr. Bryson is right not only from the point of view of highest humanitarianism, but from every other point of view, practical, moral and legal.

People's Money, without their Consent Loaned to the Allies

But, what is our Government doing? It permits and encourages American "Angels" to guard and conduct safely across the ocean to England many, many steamers laden with ammunition, destined to kill citizen-soldiers of [106] Germany. It also sees to it, that England and Russia receive all this ammunition without paying their own money for it at present. It permits, in clear violation of President Wilson's neutrality proclamation, that immensely large sums of American people's money are being lent to England and Russia. The people, whose money is thus being lent, are not asked for their consent. This is money placed by people into deposit banks, trust companies, life insurance companies and savings banks, whose directors invest their depositors' money in the war loans of the Allies, without consulting their depositors.

Autocratic Ruler of U. S. A.

And, what is our Government, anyhow? Is it a government of the people and by the people for the people? Nothing of the kind! The people send monster petitions to the President and Congress, march in monster parades and hold monster mass-meetings, requesting embargo on ammunition, but not the slightest attention is paid to all this by His Majesty President Woodrow Wilson, who acts as if he were the autocratic ruler of the U. S. A., and not like what he really is, the first servant of a sovereign people. Of

Petitions Disregarded

what use are petitions and demonstrations? We might as well petition a fence post!

Germany Good Customer of U. S. A.

Before the war, Germany was one of the best customers of the United States. She purchased annually about 170 million dollars worth of cotton, 75 millions of copper, 60 millions of wheat, 40 millions of animal fats, 20 millions of mineral oils, and in all about 430 millions of dollars of American products, while we [107] bought from Germany merchandise to the extent of 180 million of dollars.

It will bring no permanent gain to this country to furnish the means for killing and maiming the men, and destroying the property of Europe, thus lessening and crippling our legitimate trade with Europe in times of peace. It will not secure victory for Britain and her Allies, nor enable them to shorten the war. I believe that there is no combination of powers, on the face of the earth, sufficient to crush the German Empire.

Submersible "Deutschland"

Regarding the arrival of the German submersible, little need be said here, as every man, woman and child, not only in the United States but all over the world, has already read or heard of this greatest achievement of German ingenuity. I give here but the text of a statement issued by her intrepid commander, Capt. Paul Koenig:

"The submarine 'Deutschland,' which I have the honor to command, is the first of several submarines built to order of the Deutsche Ozean-Rhederei, in Bremen. She will be followed by the 'Bremen' shortly.


DEUTSCHLAND UNTER ALLES
BRITISH BLOCKADE
DEUTSCHLAND
NEWPORT NEWS

"We have brought a most valuable cargo of dyestuffs to our American friends—dyestuffs which have been so much needed for more than six months in America, and which the ruler of the sea has not allowed the great American Republic to import. While England will not allow anybody the same right on the ocean, because she rules the waves, we have by means of this submarine commenced to break this rule.

"Our boats will carry across the Atlantic the [108] mails and save them from British interruption.

"We trust the old friendly relationship with the United States, going back to the days of Washington, when it was Prussia that was the first to help America in its fight for freedom from British rule, will awaken afresh in your beautiful and powerful country.

"The house flag of the Deutsche Ozean-Rhederei is the old Bremen flag—red and white stripes, with the coat of arms of the town, and the key in the corner. The key is the sign that we have unlocked the gates which Britain tried to close against us and the trade of the world. The gates which we opened with the key will not be shut again. Open door to the trade of the world and freedom of the oceans and equal rights to all nations on the ocean will be guaranteed by Germany's victory in this struggle for her existence."

No sooner than recovered from their chagrin, caused by the trip of the "Deutschland" with her valuable cargo from Germany to America, therby giving the world a practical demonstration of the

futility of their blockade, England and her allies proclaimed a boycott against all American firms, who had business relations with the agents of that pioneer submarine trader.

Boycott Against American Firms

And this unparalleled effrontery has at last aroused the ire of Uncle Sam and has brought forcibly before him the peril of an all dominant England.

It is stated that somebody asked the intrepid captain of the blockade runner what his trip had taught him about the British blockade. Laughingly [111] he replied: "There isn't any blockade. We've proved it."

"Lest we forget," and in order to draw your attention again to the venomous utterances of American newspaper editors, I present you with two samples of their press notices. These uncalled for remarks were published in the "Boston Transcript," and reprinted in the "Honolulu Star-Bulletin."

Press Editors

"The conferring of a pearl-studded medal upon Captain Koenig by Mayor Curley will resound through the pages of history as the most gracious act since the Kaiser decorated the murderer of the unavenged Americans who went to their death on the Lusitania."

"Boston is now threatened with a visit from the German submarine Bremen, though no one knows exactly where this peaceful merchantman will make its landfall. If it comes here, there will be enough people among us, undoubtedly, to lionize its officers and men, though others would prefer to see, and to welcome in a somewhat different way, the submarine which destroyed the Lusitania. It is evident that

the German government is tending to continue the pleasing performance of sending these wolves of the sea in sheep's clothing to our shores for the purpose of keeping our government tangled up and sowing the seeds of discord."

American Clergy

Let us now analyze and dissect the American clergy, who proclaim so loudly and continuously that they are ordained, privileged and called by God to preach the mission of [112] good-will and love and moral righteousness.

Christian ministers of America have, most signally, failed to play the part of moral leadership. Why did they not raise their voices against the manufacture of things that kill, and are sold to men bent on killing? Why have they not called upon the President, the people, and especially on the greedy few who profit by their revolting traffic, and summoned them in the name of God, the Creator and Father of all men, that they return to Him with clean hands and hearts?

German Soldiers Killed by American Bullets

In the first year of the war, one-quarter of the ammunition used by the Allies was of American manufacture, and the German losses for that period are rated at 100,000 men per month or one million two hundred thousand men killed or wounded in that year. Three hundred thousand fine German boys and men killed or maimed by American bullets and shells! Think of this and cease howling about 150 American citizens killed by a German submarine, each one of which citizens had been emphatically warned of his impending danger.

The ghosts of those hundreds of thousands, whom our shrapnel has slain, will march for many a day through our land. When will this, our shame, come to an end? American soldiers killed in Mexico receive little attention in the press and their deaths remain unavenged.

American Soldiers Unavenged

Prophecy

Reminding you at last of the fact that the American Republic was born out of the tyranny of England, and that Germany is now fighting the same tyrannical foe which Washington [113] and his compatriots fought so successfully in 1775 and in 1812, I venture to make the prophecy, that in spite of President Wilson, in spite of Secretary Lansing, in spite of other friends of England in the Department of State, Germany will finally find a weak link in the chain of steel which enthralls her, and will bring England and her Allies to their knees!

The great result of the German victory will be "THE FREEDOM OF THE SEAS" TO ALL WHO TRAVERSE THE SEAS.

(Addendum follows on next page.)

ADDENDUM,

Pointing out the moral to this review.

"Whatsoever ye would that men should do unto you, do ye even so unto them."

On the streets, in our offices, at the various places of amusement, on the cars, in the trains; in fact, wherever people meet and exchange opinions, we hear words spoken which express a desire or a hope that the dreadful European war may come to a speedy termination; provided, however, that Germany be humbled to the dust before that happy event takes place. In our homes, at tea parties, even at church, devout Christian ladies lift up their eyes piously to heaven and implore the Lord to send the dove of peace to stricken Europe—as soon as the Kaiser is put out of harm's way. But why do these otherwise good and sane people speak thus with a proviso attached to their prayers? Why is there a string to their peace desires? The answer to this you will find in the pages of our mischief-making press, which has for almost two years diligently sown countless seeds of suspicion, meanness, restlessness, distrust, and spite in the hearts of millions of our best citizens.

Can you really blame a German or German-American, embittered by the constant insults to which he is subjected daily, if he also piously invokes peace with a proviso, and prays: "Heavenly Father, send us peace, but not before [115] Germany has

twisted the tail of the British Lion, until his roars of agony will penetrate to the very depths of Hades; not before the Russian Bear has received such a clubbing, that he will be glad to get away and make tracks for the North Pole; not before the vile bunch of Italian Marcaronis has been dumped into the crater of Vesuvius, together with their worthy offshoot, the contemptible little Rumanian Spaghetti."

Do you, dear reader, realize that there are two sides to this momentous question, as well as to all other questions Do you realize at all how the other fellow feels, when he or his are constantly belittled, railed at, and insulted? If you do, just open your hearts again to your former friends, close your eyes when you see the flaring headlines of our yellow journals, and plug your ears when hateful utterances are made.

If I have succeeded in making it clear that we of German blood have, just like yourselves, hearts, minds, and souls, and can love, feel, think, and pray, my aim has been attained. Then you will be able to glean from this little volume a salutary lesson. The result will be that mutual respect for one another will soon supplant bitterness and fraternal strife.

Why should we members of the same communities, workers in the same fields, reapers of the same harvests, bear ill-will, when the actual combatants in the trenches exhibit an entirely different and a far nobler attitude? Their sentiment is aptly worded in Bruno Frank's [116] beautiful poem, "In the Trenches." A translation from the German reads as follows:

Where men stand closest to their fate,
Prepared for every sudden chance
And fronting death with level glance,
There is no scorn nor hate.

Not hate but destiny demands
The death-toll; and the men who slay
Each other blamelessly today,
Tomorrow may clasp hands.

END OF PART I. [117]

TO THE MEN OF THE "DEUTSCHLAND"

.(Written for "The Irish World.")

By Joanna Bonsen.

Men of valor, strong and fearless,
  Men of action, bold and free
All the world acclaims you peerless
  Sailors of the under-sea.

Speeding in your U-Boat wonder,
  Tossed by mighty waves on high;
In a moment diving under
  When the enemy draws nigh.

Underneath the ocean gliding
  Like a creature of the deep,
Where the foe's proud dreadnaughts riding
  Watchfully their vigil keep.

Miracle of German science,
  Triumph of efficiency.
Genius, courage, firm reliance
  Wrought this marvel of the sea.

Gallant Captain, gallant seamen,
  Noble band of engineers,
Brave, unconquerable freemen,
  Blue-eyed sons of Northern spheres.

Mariners of dauntless daring
  Born to rule and to command,
Men of spirit undespairing,
  Scions of a hero land.

We salute you, we applaud you,
  Every heart thrills at your name,
Friends and foes unite to laud you
  For the deed that won you fame.

Washington, D. C. [118]

PART II

STATISTICS

COUNTRIES IN CONFLICT

Territory of Allied Powers,
31,332,000 square miles.
Territory of Central Powers,
1,245,000 square miles.
Superiority of Allies over Central Powers in area more than 25 to 1.

PEOPLE IN CONFLICT

Population of territory of Allied Powers,
846,000,000.
Population of territory of Central Powers,
177,000,000.
Superiority of Allies over Central Powers in population nearly 5 to 1.

THE NATIONS AT WAR

The Entente Allies	The Central Powers
Britain	Germany
France	Austria-Hungary
Russia	Bulgaria
Italy	Turkey [119]
San Marino	
Japan	
Belgium	
Serbia	
Montenegro	
Portugal	
Rumania	

THE WAR OF RACES

The chief races taking part in the Great War are:

Afridis
Albanians
Algerians
Annamites
Armenians
Arabs
Austrians
Bantus
Belgians
Boers
British
Bulgars
Circassians
Croatians
Czechs
Egyptians
Fins
French
Garhwalis
Georgians
Germans
Gurkhas
Italians
Japanese
Jews
Kurds
Lithuanians
Magyars
Mahrattas
Malagasy
Maoris
Montenegrins
Mongols
Pathans
Persians
Poles
Portuguese
Rumanians
Russians
Ruthenians
Senegalese
Serbs
Sikhs
Slovaks
Slovenes
Syrians
Tartars
Tonkinese
Turks
West Indians [120]

German Uhlans Beating Back Attacking English and Scotch. [121]

THE DAILY COST

The leading belligerents are now spending money at the following rates per diem:

Britain	$30,000,000
Germany	22,000,000
France	15,500,000
Russia	16,000,000
Austria	12,000,000
Italy	8,000,000
Turkey	1,500,000
Bulgaria	1,500,000
Belgium	1,500,000
Total	$108,000,000

PRISONERS OF WAR

Central Powers claim 2,876,000 prisoners in two years' warfare. [123]

Allies claim 1,421,000 prisoners in two years' warfare.

WAR CHRONICLE (on land)

A brief summary of events within the first two years.

THE CAMPAIGN IN FRANCE AND BELGIUM

August 3, 1914—Germans enter Belgium.

August 7—Germans take Liege.

August 23–25—French defeated at Charleroi and British at Mons.

September 6–10—Germans checked on the Marne.

September 14–28—Germans entrench on the Aisne.

October 9—Germans take Antwerp.

March 10–14, 1915—British attack at Neuve Chapelle without results.

April 22–May 9—Germans attack at Ypres but gain little ground.

May 9–14—French and British attack in Artois but gain no ground.

September 25–27—British attack at Loos and French in Champagne, but gain little ground.

February 21, 1916—Germans begin attack upon Verdun that still continues.

July 1—French and British begin attack on the Somme that still continues.

THE RUSSIAN CAMPAIGN

August 26–31, 1914—Russians defeated at Tannenberg, East Prussia; limit of Russian advance westward into Germany. [124]

May 1, 1915—Russians driven back from Dunajec River, Galicia; limit of Russian advance westward into Austria.

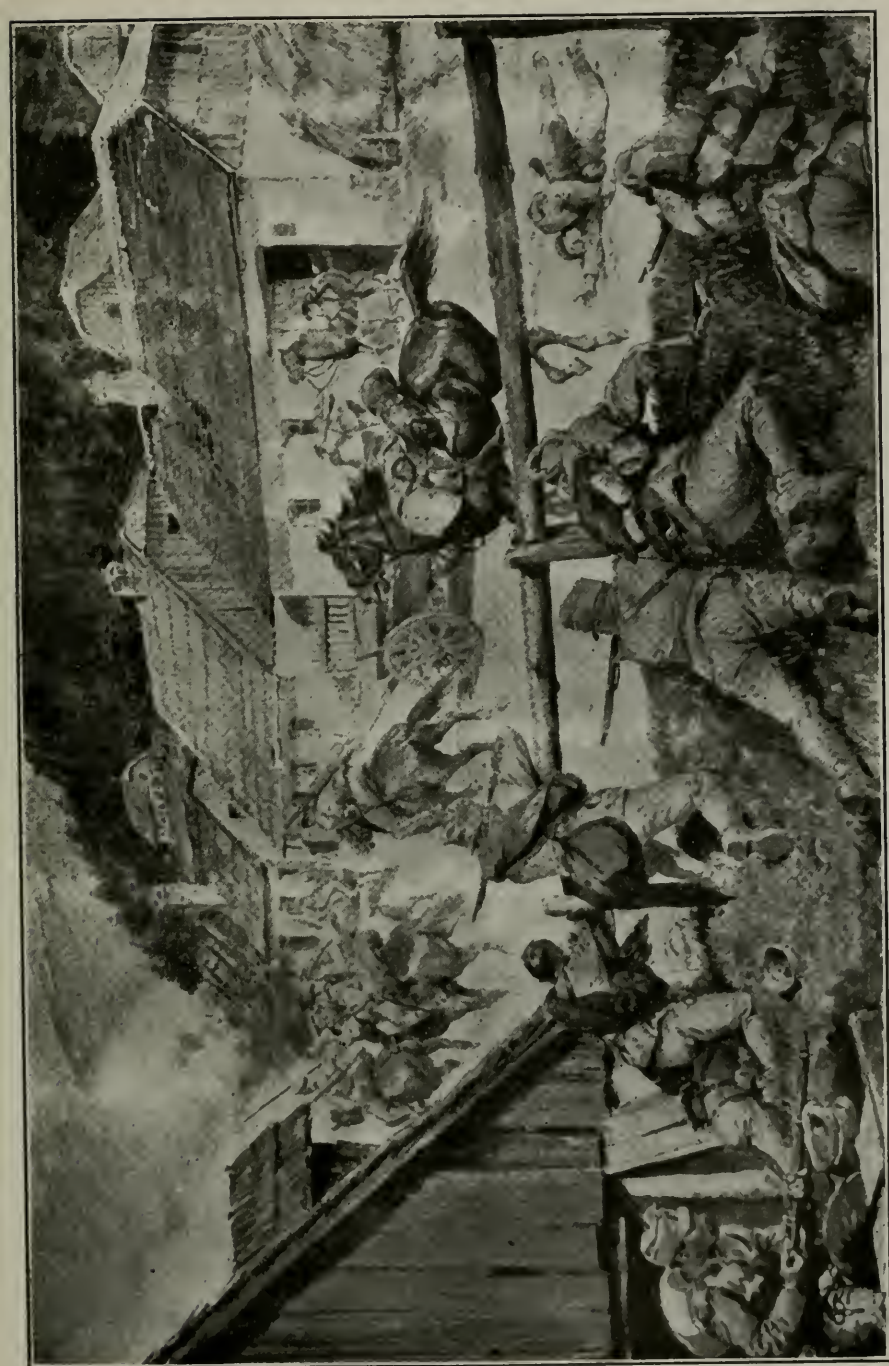
August 5, 1915—Germans take Warsaw, capital of Poland.

September 16–19, 1915—Germans take Pinsk and Vilna; limit of German advance eastward into Russia.

June 1, 1916—Russian drive begins.

June 17, 1916—Russians take Czernovitz, capital of Bukovina.

Since—Russian drive checked.



Hungarian Sharpshooters Drive a Party of Marauding Russians from a Carpathian Village. [125]

THE ITALIAN CAMPAIGN

May 23, 1915—Italy declares war on Austria.

May 15, 1916—Austrians advance from Trentino and drive back Italians.

June 20, 1916—Italians force Austrians back toward Trentino.

Since—Italian advance checked.

THE BALKAN CAMPAIGN

July 28, 1914—Austria declares war upon Serbia.

August 23, 1914—First Austrian invasion repulsed.

December 10, 1914—Second Austrian invasion repulsed.

September 20, 1915—Bulgaria mobilizes.

September 23, 1915—Greece mobilizes.

October 5, 1915—French and British troops land at Salonica. [127]

October 8, 1915—Austrians take Belgrade.

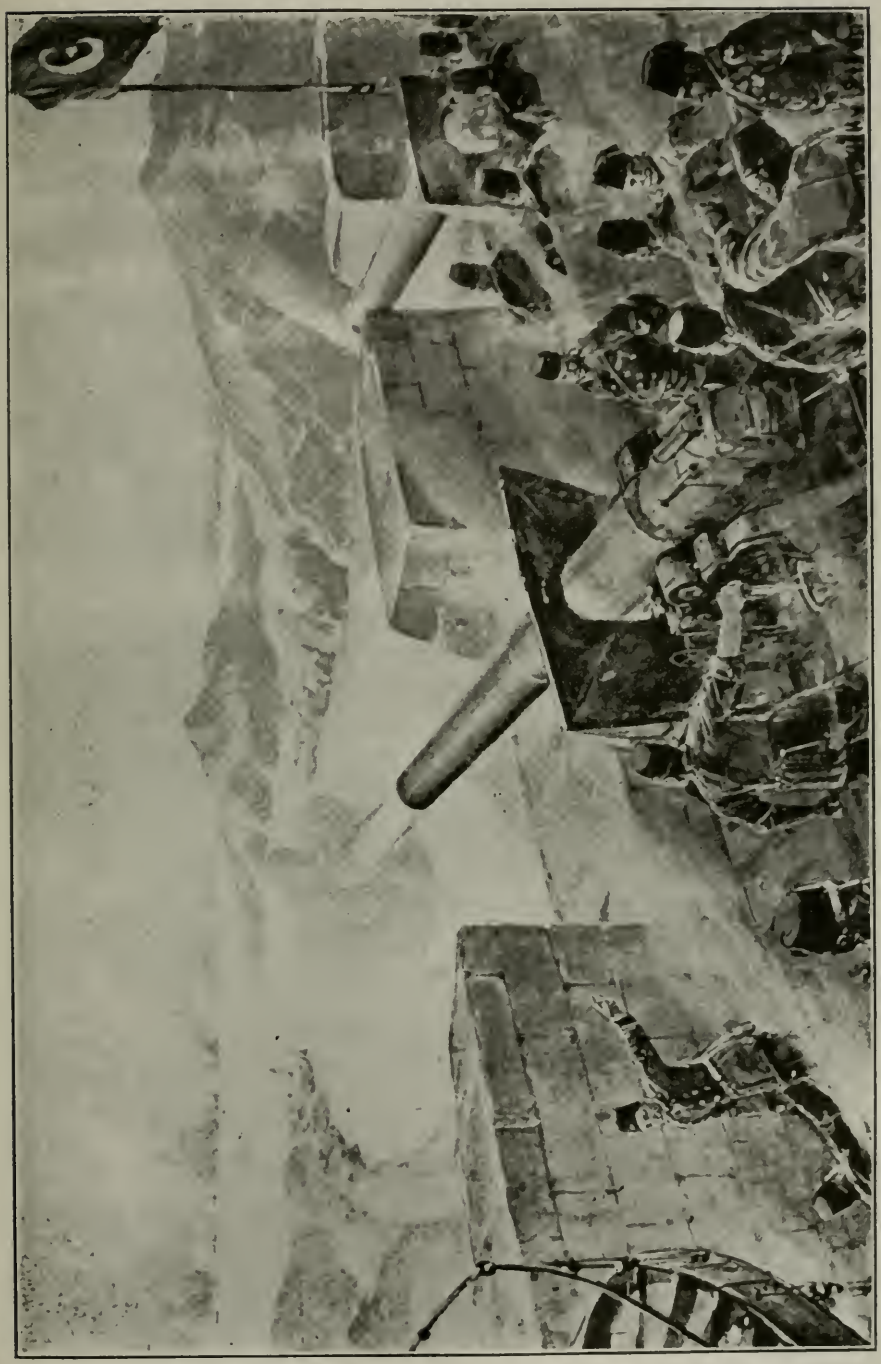
November 5, 1915—Bulgars take Nish.

November 30, 1915—Conquest of Serbia completed.

January 14, 1916—Austrians enter Cettinje, capital of Montenegro.

August 28, 1916—Rumania, selling herself to the highest bidder, enters campaign on the side of the Allies.

September 7, 1916—20,000 Rumanians surrender to Teuton and Bulgarian forces, who capture the great Rumanian fortress Turtukai. Total loss of Rumanians in dead, wounded and captured, 80,000 men.



Krupp Guns, at the Dardanelles, Manned by Turks, Drive Back Combined English and French Fleet, Sinking a Number of Battleships. [129]

THE DARDANELLES CAMPAIGN

February 19, 1915—British warships shell Turkish forts.

March 18, 1915—Two British battleships, one French battleship, several large armored cruisers, and a number of smaller warships lost in Dardanelles; fleet withdrawn.

April 25, 1915—Australasian troops landed on Gallipoli.

August 6, 1915—Second landing made at Sulva, Gallipoli.

December 19, 1915—Troops withdrawn from Gallipoli.

THE MESOPOTAMIAN CAMPAIGN

November, 1914—British take Basra, near head of Persian Gulf. [128]

January, 1915—Expedition starts up Tigris.

November 22, 1915—British advance checked at Ctesiphon, 18 miles below Bagdad.

December 3, 1915—British expedition retires to Kut-el-Amara and is there besieged.

April 29, 1916—British expedition surrenders at Kut-el-Amara.

Later—Continued British reverses.

THE CAUCASIAN CAMPAIGN

February 15, 1916—Russians take Erzerum.

April 18, 1916—Russians take Trebizond.

July 26, 1916—Russians take Erzingan.

August, 1916—Turks drive back Russians on all fronts.

August 7 and 8, 1916—Turks won great victory over Russians, and occupied the fortified towns of Bitles and Mash, thereby seriously menacing both the Russian advance into Armenia, and the position of the Allies in Persia.

BATTLE FRONTS

In Europe	*Miles*
Western	590
Eastern	785
Italian	300
Balkan	110
In Asia (intermittent)	750
Africa (intermittent)	300
Total	2,835

[131]

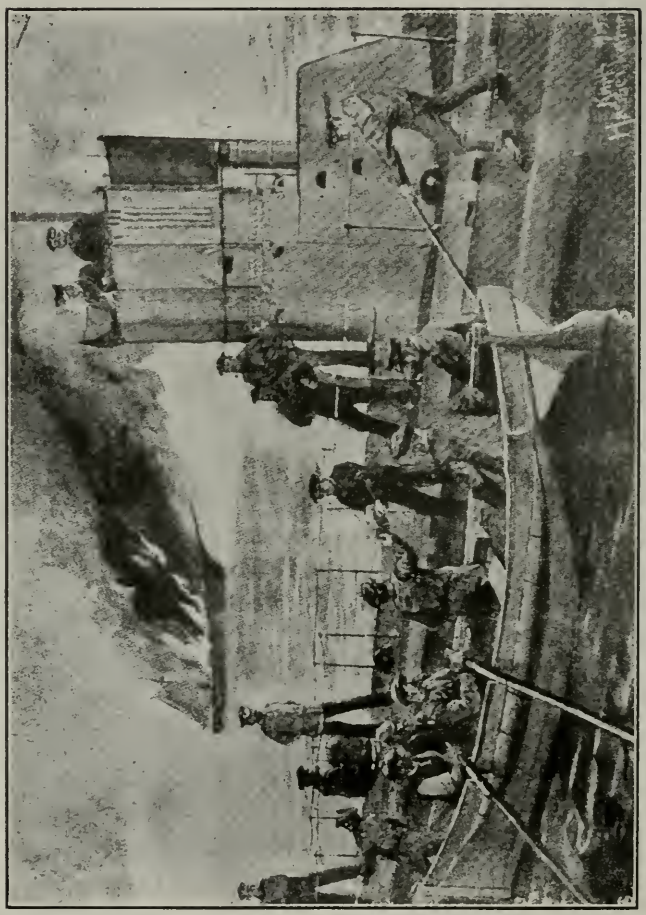
THE WAR ON THE SEAS

August 5, 1914—British fleet, under Beatty, sinks three German cruisers in the Bight of Helgoland.

August 8, 1914—Battle between German mine-layer "Koenigin Louise" and British auxiliary cruiser "Amphion." Both sank.

November 1, 1914—German squadron, under von Spee, defeats British squadron, under Cradock, off Coronel, Chile, sinking the armored cruisers "Good Hope" and "Monmouth."

December 8, 1914—Re-enforced by Japanese, the combined enemy fleets, under the command of Sturdee, destroyed von Spee's little squadron near Falkland Island.



Humanity Shown by German Submarine Sailors (distributing bread to crew of their victim).

January 24, 1915—Battle of Dogger Bank. Germans lose battle-cruiser "Bluecher," the English losing one battle cruiser. Several British torpedo boats were severely damaged. Enemy broke off the fight, in fear of the approaching U boats.

February 7, 1915—Germans declare a war zone around British Isles, in retaliation for blockade established by Allies.

March 11, 1915—British Order-in-Council, in direct violation of all international rules, and against the laws of humanity, establishes cordon control, to shut off all goods (contraband or non-contraband) going to or from Germany.

May 7, 1915—"Lusitania" sunk. [132]

May 4, 1916—Germany agrees not to sink liners without warning.

May 31, 1916—Greatest naval battle of history fought off Jutland. The German Navy gained a decided advantage over the numerically vastly superior British sea forces, and thereby destroys England's much vaunted naval prestige.

June 5, 1916—England renounces the "Declaration of London." [135]

THE SUBMARINE IN THE EUROPEAN WAR

August 9, 1914—British cruiser "Birmingham" sank German Submarine U–15.

September 6, 1914—German submarine sank the British cruiser "Pathfinder."

September 22, 1914—U–9, Captain Weddigen commanding, sank the three large armored British cruisers "Cressy," "Hogue" and "Aboukir" (each of 12,000 tons).

Somewhat later—German U boats sank the protected British cruisers "Hawke" and "Hermes," and the British gunboat "Niger."

November, 1914—British submarine sank the German light cruiser "Hela."

January 1, 1915—German submarine sank British battleship "Formidable" (15,000 tons).

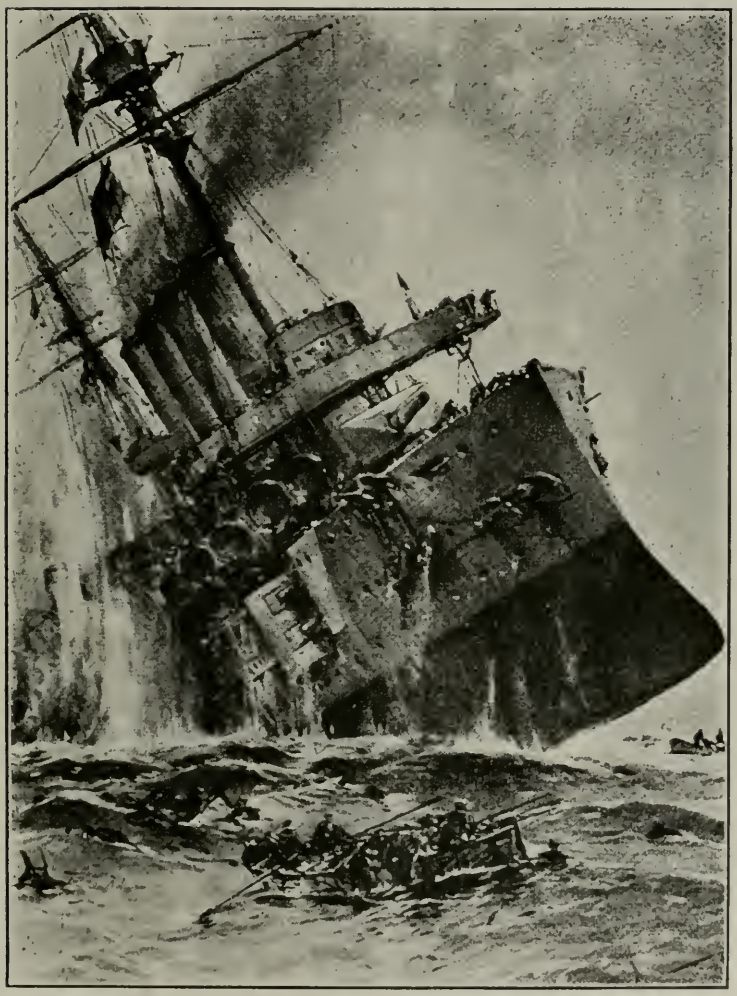
February 19, 1915—German submarine, in the Channel, sank English transport with 2000 men on board.

February 22, 1915—German U boat sank English transport No. 192.

February 24, 1915—Near Beachy Head, U boat or mine destroyed English transport; loss 1800 lives.

Early in 1915—Two British submarines were destroyed, while the Germans lost the U–18, which was rammed by a British patrol vessel, and another U boat, which was sunk by gunfire.

March 11, 1915—English auxiliary cruiser "Bayamo" sunk by U boat or mine. [136]



Destruction of British Cruiser "Hampshire," which carried Lord Kitchener to his watery grave. [137]

May 4, 1915—English submarine sunk by German seaplane.

The only feat worth mentioning of British submarine warfare is that of the B–11, which passed under five rows of mines in the Dardanelles, and sank the old type Turkish battleship "Messudieh."

Austrian submarines, like the German, proved vastly superior to those of Britain and her Allies. [139]

GERMAN SEA-ROVERS

Many of the light German cruisers and converted merchant vessels pursued a very successful career of commerce destroying. The most spectacular was that of the "Emden," Captain von Mueller commanding. She started on her career September 10, 1914, in the Bay of Bengal, and was for two months the terror of the Indian Ocean, though closely pursued all the time by numerous English, Australian, Russian, French and Japanese warships of every description. She destroyed ten million dollars' worth of shipping; entered the port of Penang in disguise in broad daylight, sank a light Russian cruiser of nearly her own size and a French destroyer, and escaped practically unscathed; wrecked several signal stations and supply depots, and was finally driven ashore and shot to pieces by the large cruiser "Sydney" of the Australian colonial forces.

The second in command of the "Emden," Lieutenant von Muecke, who was left behind on Cocos Island with a handful of men, seized the schooner "Ayesha," and after an eight weeks' adventurous cruise, landed at Hodeida, Arabia. Here commenced their perilous journey, which defies description. Losing over half of their men in encounters with hostile Arabs, the remainder of that gallant band finally arrived, utterly exhausted, at Constantinople.

The "Koenigsberg," "Karlsruhe" and "Dresden" had somewhat similar careers, which will be inscribed with large letters in the "Glory Pages" of history.

The "Moeve" alone, after a splendid record, and breaking the English blockade twice, bears the distinction of being the only one of the German commerce destroyers to get back into home waters safely, arriving March 15, 1916.

It was the "Moeve" that captured the British steamer "Appam," which arrived with a prize crew on board, February 1, 1916, at Hampton Roads, having safely traversed the Atlantic Ocean.

Space does not permit me to go into further details about the daring deeds of the heroic men of these small, but swift German cruisers, which roamed the oceans, demoralizing the commerce of her enemies. Singly, their commanders would select their field of operations, knowing well that, hounded by the powerful fleets of the various opposing nations, they would, sooner or later, have to face certain destruction. The daring deeds of the gallant sailors and gentlemanly officers of these ships will forever adorn the annals of history. They will stand out boldly in contrast with those of the British, who, in cold blood, brutally murdered the crew of a sunken submarine ("Baralong" atrocity) ¶, who, in defiance of [141]

¶According to testimony given, the submarine fired at the "Nicosian," when the "Baralong" appeared displaying the American flag, and sunk the German submarine. When the captain and four men of the submarine attempted to climb aboard the "Nicosian" they were killed while battling in the water for their lives.

The affidavits were signed by James G. Curran, Chicago; Edward Clark, Detroit; B. Emerson Palen, New York, and Chas. D. Hightower, and R. H. Crosby of Crystal City, Texas. They declare that the incident occurred forty miles from Lundy on August 19th, while the "Nicosian" was on her way to Liverpool. (Similar reports have been given by an American veterinary surgeon who had been aboard the "Nicosian" at that time.)

AND, with this evidence confronting them, the English, since they have come in conflict with the Teutons, and have been humiliated by them, still have the colossal effrontery to call the Germans, who are

international law, entered a neutral (Chilean) port and there destroyed the crippled and helpless little "Dresden," who sank in neutral Spanish waters, the auxiliary cruiser "Kaiser Wilhelm der Grosse," who sank the Lloyd steamer "Gneisenau" in the harbor of Antwerp, and who foully murdered Captain Weddigen (of the U–9) and his brave men.

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recognized to stand on the very highest pinnacle of civilization—**Barbarians.**

The English, before the war, would grudgingly admit that their German kinsmen made good soldiers, but would look with haughty contempt upon the German sailor lads.

During the present conflict, the gallant German "Blue Jackets" have shown their mettle. They have demonstrated to the world that they are not only **equal, but superior to the former alleged "Lords of the Seas."**

After the war is over, and the ghastly wounds are healed, British sailor boys, in calm blood, will recognize this fact, and will treat with respect those who they were apt to look upon with disdain, before they met them in deadly conflict.

Not only British tars or those of the Allies, but the whole world will not fail to give to the German sailors unstinted and well-merited praise for their unparalleled bravery, skill, chivalry, deeds of daring, and sportsmanlike conduct.

END OF PART II. [142]

INDEX OF CONTENTS

(Alphabetically arranged)

Defendant's Exhibit "A"—Excerpt from Honolulu "Star-Bulletin."

EQUITY #10.

Filed Jany. 6, 1919. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.

HONOLULU STAR-BULLETIN. 3:30 Edition.

Honolulu, Territory of Hawaii,

Wednesday, August 11, 1915.

"HONOLULU MAN'S PEACE PLAN BROACHED TO MANY NATIONS.

DR. SCHURMANN WRITES TO BELLIGERENTS AND NEUTRALS; ANSWERS MAKE HIM CONFIDENT OF CREATING IMPRESSION; EXPECTS TO BE CALLED TO WASHINGTON TO DISCUSS PROPOSAL.

To be the author of peace plans which are intended to bring about the end of the great European war and which are now under consideration by the President of the United States, the rulers of five other neutral countries, and by rulers of some of the belligerent nations, is the unique distinction that has come to a citizen of Honolulu.

Dr. F. H. Schurmann of the Schurmann Institute of Nature Cure and Osteopathy, is the author of the plans, and at the present moment he is expecting daily to receive a call from President Wilson to come to Washington for a further discussion of them.

Dr. Schurmann is a native of Essen, Germany. His story reads like a chapter from a book of fiction.

Several weeks previous to the outbreak of the war

the doctor suffered an attack of diphtheria, which being considered by attending physicians as a mere sore throat, was not taken in hand for treatment until several days had passed. The doctor was at last obliged to go up to Tantalus for a prolonged rest and here on the mountain a complete cure was thought to have been effected. Accordingly he returned to the city.

"The day I returned to the city," says Dr. Schurmann, "I learned for the first time that Germany had declared war upon Russia. My first thought was to serve the Fatherland, and accordingly I went to the German consul here and offered my services, which were accepted. Plans were already begun for starting to the front when I suffered a [38] sudden stroke of paralysis and was rendered blind and practically unable to move."

It was in this condition of paralysis, brought on presumably by the poison from the diphtheria toxins which were already in his blood, that the doctor found himself at the very moment when he was intending to depart in the service of his country.

The result of the paralytic stroke rendered him absolutely helpless for about eight months, but though his body was helpless and his sight was gone, the doctor's mind was still active, and with the excitement of enlistment still upon him, he began a study of peace plans which might bring about a reconciliation between the warring nations.

After several weeks spent upon the subject he finally decided upon conditions which he felt might be considered fair by all the parties at war, and ac-

cordingly, he sent these plans to President Wilson. The letter and plans follow.

"Honolulu, T. H., October 1, 1914.

"His Excellency, Woodrow Wilson, President of the United States of America.

"Dear Sir:

"Whereas grave and unparallelled conditions require radical measures kindly permit me to present to you the following suggestions, which, I hope, may appear to you of some value.

"FOR THE ESTABLISHMENT OF PEACE BETWEEN WARRING NATIONS.

"1. Restoration of all boundaries of the belligerents.

"2. Restoration of all captured possessions or colonies.

"3. Restoration of all captured or interned vessels, whether merchant or men-of-war.

"4. Incorporation of Belgium and her possessions with France.

"5. Incorporation of the Netherlands and her possessions with Germany. This is inevitable, and it will relieve Germany of her congested shipping conditions.

"6. Protectorate over Portugal and her possessions by Great Britain. [39]

"7. Transferring of German East Africa to Great Britain.

"8. Acknowledgment of full suzerainty of Great Britain over Egypt. This plan and the two before it will give Great Britain her 'all red' route from the Cape to Cairo.

"9. Restoration of Port Arthur to Russia by Japan. This will forever cement the new friendship between the two countries.

"10. Opening of the Dardanelles. This plan and the one before it will give Russia her desired ice-free ocean outlets.

"11. Division of Albania as follows: The northern portion to go to Montenegro; the southern part to go to Servia, with an outlet to the Adriatic. This will do away with troublesome Albania, give Montenegro more territory, and give Servia an outlet to the Adriatic.

"12. Purchase of the Philippine Islands from the United States by Japan. This will rid the United States of an apple of contention and give vent to the pent-up energies of Japan.

"13. Annexation of Lower California, Sonora and Chihuahua by the United States. This would be an act of mercy and would be for the betterment of those three neighboring States. It would facilitate and quicken the handling of affairs, should a repetition of the present condition of things occur.

"14. Stern warning to Mexico, that, after six months, Coahuila, Neuvo Leon and Tamaulipas will be annexed if an orderly government be not established within that time.

"15. Reduction of the Armies of Germany, France, Russia, Austria, Italy and Japan to one-half their respective present peace strengths, other nations not to increase their present peace armament.

"16. A naval holiday of five years for all powers.

This would give the stricken nations a chance to recuperate."

With this letter were enclosed plans for the prevention of future wars, as follows: [40]

763.72/11.

FOR THE PREVENTION OF FUTURE WARS.

1. Definition of who are the first-class powers.

2. Abolition of offensive or defensive alliances between first-class powers.

3. Definition of who are second-class powers.

4. All second-class powers to act co-exception, looked forward to the "injointly as arbitrators, in case of trouble between two first-class powers.

5. Should arbitration fail the two antagonistic first-class powers must fight out their difference without being able to involve a third power.

6. Difficulties of second-class powers will be arbitrated by all first-class powers.

8. Definition of who are third-class powers.

9. Third-class powers must submit to arbitration of a counsel of the combined second-class powers.

10. Arbitration to be enforced by the combined second-class powers.

11. Should a second-class power have a grievance against a first-class power, delegates from all first-class and second-class powers should arbitrate.

12. Difficulties between a first-class power and a second-class power or between any of the lesser powers will be arbitrated.

13. Abolition of death sentence of alleged spies to be insisted upon.

14. Whereas the practice of throwing bombs into

cities or places endangers the lives of non-combatants, such practice should be prohibited.

15. Whereas lives and property of non-combatants have been constantly endangered by floating mines, since they have become factors in maritime warfare, the use of marine mines for the protection of harbors, [41] straits or rivers should be prohibited.

16. Whereas the Monroe Doctrine is obnoxious to both European and South American countries, and therefore will create, sooner or later, internation questions or cause serious complications, it is advisable to abrogate the same.

LETTERS ARE ANSWERED.

At about the same time that the letter was sent to President Wilson, a letter containing the same proposals for peace was sent to the doctor's father in Germany, a man 86 years of age, who before he was retired by the emperor, served as instructor in modern languages in the imperial schools of Germany.

The President's reply to the proposals was received in due time, and almost to the surprise, certainly to the great joy of the doctor, seemed to favor the suggestions which the plans carried. The first letter from the President's secretary is printed here. Others received from him are of such a nature that the doctor feels he would be violating a sacred confidence if he allowed them to be printed at the present time.

DEPARTMENT OF STATE,
Washington, D. C.
November 14, 1914.

Doctor F. Schurmann,
Honolulu, Territory of Hawaii.

Sir:—

The Secretary of State directs me to acknowledge the receipt, by reference from the White House, of your letter of October 14th and in reply to inform you that your suggestions for the permanent establishment of peace have received the attention of the Department.

I am Sir,
Your obedient servant,
(Sgd.) E. C. SWEET,
Confidential Clerk.

"The letter which came to me later from my father," says Dr. Schurmann, "was the hardest blow I have ever received. I had presumed up to the time when I received it that all the German people were wanting to see the war brought to an end and I had supposed that my [42] father would fairly snap up any proposals of the sort which I should make.

"On the other hand, his message to me was one of scorn, that I should think of offering such proposals for peace when the country was engaged in a war which he felt could not result otherwise than with a final good for Germany and for the world."

" 'We shall never conclude peace," he wrote, 'until Russia is driven back across her own country, until France is on her knees begging for mercy and Great Britain is sunk beneath the ocean. Already

we hear the death rattle in Great Britain's throat.' "

Dr. Schurmann says that this was the first letter that told him how greatly the material spirit had sunk into the very heart of Germany.

"In every letter since that time," he says, "My father and mother write, begging me to come back and fight for the Fatherland, and I suppose I should do so even yet were my strength to come entirely back to me. I have three brothers fighting in the war, also three brothers-in-law, and of my near relatives, 60 are at the front."

WRITES SECRETARY BRYAN.

Following the receipt of the favorable letter from Washington, Dr. Schurmann immediately wrote again to Secretary Bryan as follows:

Honolulu, T. H., Jan. 16, 1915.

The Secretary of State, Washington, D. C.

Dear Sir:

The reply to my letter of October 14 reached me November 18, and I am greatly pleased to know that my suggestions were deemed worthy of consideration.

Carefully watching developments, I am more than ever impressed with the feasibility of my thoughts and have venture to further my plans by writing to the chief magistrates of ten other neutral countries. A copy of such a letter is herein enclosed and is self-explanatory.

On one point, that is a *class* 5 in A, "For the establishment of peace between the warring nations," mentioning the incorporation of "The Netherlands

and her possessions with Germany," we must not lose [43] sight of the fact that the Hollanders have never forgotten their struggle with England for naval supremacy; that Van Tromp and De Ruyter are still their greatest heroes; that the wiping out of the two Dutch Republics in South Africa is fresh in their memories; and that 30,000 young Hollanders emigrate yearly to Germany in order to better their conditions—becoming Germans in fact.

I have sounded hundreds of Hollanders and I have not found one who did not realize that an amalgamation of Holland with her big Teutonic brother would be of benefit to both countries. Six years ago a Dutch cruiser visited us in Honolulu, and interrogating the majority of her officers, I found that all, without a single *evitable,* with eager expectation. I am fully assured, should Germany pledge herself not to increase the length of conscription which is now 12 months in Holland (the Hollander not being a military enthusiast), that no man would object to be a participant of the many advantages which the protection of industrial and progressive Germany would bring him.

Respectfully yours,

F. H. SCHURMANN.

WRITES TO NEUTRAL COUNTRIES.

In addition to this the following duplicate letter was sent to the rulers of 10 neutral nations. Of these 10, five rulers have answered the doctor favorably, he asserts, and are now in communication with the President of the United States on the question.

Honolulu, T. H., January 16, 1915.

His Excellency Senor Don Estrada Cabrara, President of the Republic of Guatemala.

Dear Sir:

Having delivered to his Excellency W. Wilson, President of the United States, by means of a letter dated October 1, 1914, a set of articles for the re-establishment of peace in Europe and for the re-adjustment of affairs in general and receiving a prompt reply through official channels, I feel encouraged to submit to your Excellency's consideration a copy of said document and of the reply from the White House. [44]

I lay before you the fact that our beloved and wise chief executive found my humble document worthy of consideration and beg you to communicate with him in this matter, offering him your co-operation. Recognizing the unparalleled heroism of all the belligerents and realizing that nothing can be gained for either side by prolonging this terrible strife, the time is now ripe for all civilized and thoughtful neutrals to band together for the purpose of opening for the belligerents a way to honorable adjustment.

I have mailed similar appeals to the following:

1. His Excellency, the President of Guatemala.
2. His Excellency, the President of Brazil.
3. His Excellency, the President of Argentine.
4. His Excellency, the President of Chile.
5. His Excellency, the President of China.
6. His Majesty, the King of Italy.
7. His Majesty, the King of Spain.
8. His Majesty, the King of Denmark.

9. His Majesty, the King of Sweden.

10. His Majesty, the King of Norway.

Thus approached by eleven sincere neutral nations, and with the blessings of God, the warring countries would surely not refuse to listen to an appeal to reason.

Once a temporary armistice established, the rest would be comparatively easy.

A grain of sand may become a factor of ruining a priceless piece of machinery; a thought or a letter of your Excellency's valuable aid may establish a permanent peace.

Your Excellency's humble servant,

F. H. SCHURMANN.

HEARS FROM von BERNSTORFF.

The next step taken by the doctor was in the sending of letters praying for a consideration of the proposals to the rulers of the various warring countries, but from these men no word has yet been received. The [45] German embassador at Washington, Count von Bernstorff, however, asked for more details on the plans, and Dr. Schurmann thinks from the tone of the letter that the emperor himself is at the bottom of the request. This is one of the letters which the doctor keeps secret although he is willing to let the letter-head and the signature be seen to prove the validity of the manuscript.

Hoping that the Pope might be helpful in getting the plans through to the Kaiser, a letter was sent to His Holiness as follows:

Honolulu, T. H., February 23, 1915.

His Holiness, Pope Benedict XV.

Vatican, Rome, Italy.

Your Holiness:

October 14 I mailed to his Excellency, President W. Wilson of the United States of America certain documents: (A) For the establishment of peace between the warring nations and (B) For the prevention of future wars. My suggestions were very promptly considered by our Chief Executive and a reply forwarded to me, which reached me November 18.

Encouraged by this, I mailed copies of the same documents to the rulers of ten neutral powers and later similar copies to:

His Majesty George V. King of Great Britain and Ireland, Emperor of India.

His Majesty Nicholas, Czar of Russia.

His Majesty Peter I, King of Servia.

His Excellency Raymond Poincare, President of the French Republic.

Yesterday I received from the Imperial German Embassy, Washington, D. C., a request to forward a copy of said documents to his Majesty Emperor William II. I addressed at once a letter to his Majesty with all documents; but fearing that the documents may not reach him by direct mail, and being well acquainted with Your Holiness' efforts with regard to the re-establishment of peace. I humbly ask Your Holiness, in the name of our Redeemer, to forward said documents or copies to His Majesty, Emperior William of Germany, I am,

F. H. SCHURMANN. [46]

A few weeks previous to this letter, a letter had been sent to the King of England, reading thus:

Honolulu, T. H., January 28, 1915.

His Majesty George V. King of Great Britain and Ireland, Emperor of India:

Sir:

Encouraged by many friends and well-wishers some holding high positions in the United States Army and Navy—I lay before Your Majesty's Gracious Indulgence copies of certain documents, of which the originals are now in the hands of eleven neutral powers.

As author of these thoughts of a "General Readjustment," I beg Your Majesty to feel assured that the welfare of all parties concerned has been considered with absolute disinterestedness, although I must admit to the fact that I claim Germany as the land of my birth.

Similar letters and copies of documents have been forwarded to all the rulers of the nations at war.

An addendum to my suggestions, which in all probability would favor France, and which would, in any event, be a solution—fair to both Germany and France—should demand a popular vote in Alsace and in Lorraine to determine under which power those provinces would wish to become integral parts.

Praying for Your Majesty's kind attention, I remain

Your devoted servant,

F. H. SCHURMANN.

Letters are still coming in from various parties

concerned, but none of these at present may be published. The doctor says he has shown his proposals to prominent local military authorities who tell him that they believe the plans entirely feasible.

"It is from these little words of cheer here and there," says Dr. Schurmann, "that I have been *let* on, even when there seemed no hope that the proposals would have any lasting effect. The words from President Wilson, of course, have been most helpful, for I realize that he of all men perhaps can bring about a starting toward peace. [47]

"The work itself," he says, "which has been necessitated by the increased correspondence as time goes on, has been enormous. I suppose that up to the present time my correspondence alone on the matter has amounted to more than 500 typewritten pages. That gives some idea of the work that it has brought me. I can say, however, that conditions seem to be growing more and more favorable, and I should not be surprised at any time to receive a call to come to Washington and place my plans directly before the president."

Though born in Germany, Dr. Schurmann is a citizen of the United States and he has been a resident of Honolulu for several years. His boyhood was spent playing about the guns in the Krupp factories at Essen, his native town.

"My father," says the doctor, "was the special tutor to Miss Frieda Krupp, now the wife of a German naval officer and the present owner of the great factory. We children were all privileged characters about the place and were among the very, very few

who were allowed to go here and there as we pleased."

Dr. Schurmann received his German education in the high schools of the Fatherland and then came to America to try his fortune here. He is a graduate of the School of Osteopathy at Kirksville, Mo.

The effects of the paralysis have almost left him, though strength has come back very slowly, and he expects in time to be entirely recovered. The sight of his right eye is still very much affected, but that too, he says, is getting better. [48]

Defendants' Exhibit "B"—Letter, Dated April 24, 1916, Patterson to Schurmann.

THE AMERICAN RED CROSS.
WASHINGTON, D. C.

April 24, 1916.

Dr. F. H. Schurmann,
Honolulu, T. H.

Dear Sir:—

Yours of the 6th instant just received. I wish to thank you very much for your generous offer of assistance. However, the enclosed circular will show you the status of our European service. There is no doubt that the use of passive motion, massage, etc., would be a most valuable adjunct to the treatment of injuries in war. I am returning you the clipping which you so kindly sent me.

Very truly yours,
(Sgd.) ROBT. PATTERSON,
Major, Medical Corps, U. S. Army,
Chief of Bureau.

Enclosure.
RUP-I. [49]

THE AMERICAN RED CROSS
WASHINGTON, D. C.

MEMBERSHIP. CLASS–SUBSCRIBING
DUES PAID, $2.00
(Including Magazine)

CERTIFICATE OF MEMBERSHIP.

Dr. Wm. Schurmann.
Beretania St.
Honolulu, Hawaii. [50]

CIRCULAR OF INFORMATION REGARDING APPLICANTS FOR POSITIONS WITH THE AMERICAN RED CROSS IN EUROPE.

The American Red Cross has withdrawn all of its personnel from Europe with the exception of the American Red Cross Unit in Belgium, which will remain until May, 1916, when they will have completed one year's service. The other Units formerly in Europe served for more than twelve months before they were recalled. The withdrawal of the personnel by the American Red Cross was necessitated by lack of funds.

It is intended, however, to continue sending shipments of surgical, medical and hospital supplies to the Red Cross societies of the warring nations for the duration of the war, provided sufficient funds are available.

THERE ARE THEREFORE NO VACANCIES TO WHICH SURGEONS, NURSES, OR LAY ASSISTANTS CAN BE APPOINTED IN THE AMERICAN RED CROSS SERVICE IN EUROPE.

The names of individuals who offer to serve the

American Red Cross in case of hostilities involving our own country, will be placed on file, for further reference.

(Sgd.) ROBT. PATTERSON.
Major, Medical Corps, U. S. Army,
Chief of Bureau.

B. M. S.—#1.
March 1, 1916. [51]

Defendants' Exhibit "C"—Letter, August 27, 1917, U. S. Attorney to Schurmann.

COPY.

August 27, 1917.

Dr. F. Schurmann,
167 Beretania Avenue,
City.

Dear Sir:—

Replying to your favor of yesterday, which I have just received, beg to say that I see no necessity for your depositing the books in question with me.

The item in the "Advertiser" is an error as to the dates, the facts being that you brought me copy of your book on August the 18th, and it was not until late in the afternoon of August 20th that I gave you my opinion in regard to the same.

Yours truly,

_____,
United States Attorney. [52]

Honolulu, T. H., August 26/17.

Hon. S. C. Huber, U. S. District Attorney.

Dear Sir:

I beg to draw your attention to the following

statement made by the BYSTANDER in to-day's (Sunday, Aug. 26, 1917) "Advertiser."

"Schurmann says he was advised by the federal attorney to cease circulating this book on Saturday, August 18. Why then did he sell at least one copy on Tuesday, August 21? I would be glad to submit the proof of this sale to the federal authorities."

I hereby, most emphatically, deny that any book was sold by me after Saturday, August 18; neither do I intend to do so except by permission of the United States Attorney-General.

With hundreds of copies in circulation here in Honolulu, the "Advertiser" has, no doubt, found it easy to obtain a copy of the book, and then deemed it expedient to add to its countless dirty tricks and lies—by juggling with the date of the sale of the above mentioned book.

If the tool, employed by the "Advertiser" should be given the "Third Degree," he would either break down or perjure himself, and further mischief might thus be prevented.

I am perfectly willing to deliver into your hands all remaining copies of the "Red Book" until a decision is handed down by the Attorney General, or until a treaty of peace signed between the United States and Germany.

Most respectfully yours,

(Sgd.) F. SCHURMANN. [53]

In the United States District Court for the Territory of Hawaii.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Defendant.

Opinion.

S. C. HUBER, United States Attorney, and J. J. BANKS, Assistant U. S. Attorney, for the United States.

CLAUDIUS H. McBRIDE, for Respondent.

HORACE W. VAUGHAN, Judge.

Honolulu, Hawaii, January 18, 1919.

Filed Jany. 20, 1919. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. [54]

SYLLABUS.

Aliens—Naturalization—Cancellation of certificate of citizenship:

Petition for cancellation of citizenship certificate alleging in substance insincerity in professed renunciation of former allegiance in taking oath to procure such certificate, charges fraud authorizing cancellation.

Aliens—Naturalization—Cancellation of citizenship certificate:

The publication of propaganda in favor of Germany during the controversy between Germany

and the United States preceding the war and the desire to circulate such propaganda after the United States and Germany were at war is evidence of allegiance to Germany on the part of one formerly a subject of the Kaiser.

Same:

Conclusion that renunciation of allegiance was not made absolutely and in good faith is warranted by the subsequent *recognition such* allegiance. [55]

In the United States District Court for the Territory of Hawaii.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA

vs.

FRANK H. SCHURMANN.

This is a proceeding under section 15 of the Act of June 29, 1906 (Comp. St. 1916, sec. 4374), to cancel the certificate of citizenship granted to respondent by the Superior Court of Los Angeles County, California, on December 17, 1904. The bill alleges in substance and effect that respondent, being then a subject of the German Government and of William II, Emperor thereof, and desiring to obtain the rights and privileges of citizenship and incident to citizenship in the United States, and being required by law in order to obtain such rights and privileges to renounce under oath absolutely and entirely all allegiance and fidelity to all others and particularly to the German Government and the Emperor thereof,

did take the oath required by law and did swear that he then renounced all allegiance and fidelity to all others and particularly to the German Government and to William II, Emperor, and did thereby procure the certificate of citizenship, aforesaid; and that when respondent did so swear he did not in truth and in fact renounce said allegiance and fidelity, his renunciation was mere pretense, and he remained under and bound by and to the allegiance he professed to renounce; and that he thereby procured said certificate by fraud.

Respondent demurred to the bill, contending that it [56] charges no such fraud as is within the meaning of the law authorizing cancellation on the ground of fraud. It should not be necessary to cite authorities to sustain the proposition that if when respondent swore that he renounced his allegiance to the German Government and to the German Emperor his renunciation was mere pretense and he remained faithful to and bound to and by the allegiance he professed to renounce, as the bill charges, he committed such fraud to procure the certificate of citizenship as authorizes its cancellation. The proposition is easily deducible from fundamental principles. It is also supported by authorities. The very question was decided in U. S. v. Wusterbarth, 249 Fed. 908, and in U. S. v. Dunbar, 249 Fed. 989. Our laws are and have always been quite liberal to the alien, but not so liberal as to permit him to commit fraud in order to obtain citizenship. If able to pass the requirements of our immigration laws he is permitted to enter our country and live among us, enjoy

the blessings of "liberty regulated by law," send his children to our public free schools, and do almost anything citizens of our country may do except vote and hold office, and in some states he may do these also after a mere declaration of intention to become a citizen; and after a few years residence in our country, he may obtain all the rights and privileges of citizenship by complying with the requirements of our laws in regard thereto, one of which is that he must declare on oath that he is attached to the principles of the Constitution of the United States, and another of which is that he must swear in open court that he will support and defend the Constitution and Laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same, and another of which is that he shall declare upon oath in open court that he absolutely [57] and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly by name to the prince, potentate, state or sovereignty of which he was before a citizen or subject. If when he does any of these things required by law in order to obtain citizenship, he is insincere, is at heart a royalist or a monarchist or an anarchist or is not really attached to the principles of the Constitution or remains faithful or bound to or by the allegiance he professes to renounce, he is guilty of fraud that vitiates the certificate he obtains thereby, and should be deprived of it and *or* rights and privileges incident thereto.

The answer makes such admissions that the only issue of fact raised by the pleadings is whether at the

time respondent swore he renounced his allegiance to the German Government and Emperor, he did not in fact renounce it, but kept it. The evidence by which the Government has sought to prove that he did not renounce it is of acts and conduct and oral and written expressions of respondent subsequent to the beginning of the war begun by Germany by the invasion of Belgium, in August, 1914, and having relation to it, and showing that from the beginning respondent's heart was with the Kaiser in all his mad efforts to conquer and subjugate, and that his allegiance and fidelity to the German Government and to the German Emperor were supreme over his mind and heart. Quite a number of witnesses have testified to various oral expressions of respondent. Both before and after the Government of the United States declared that the German Government was carrying on war against us and began to make the necessary preparation to defend against it, respondent lauded the conduct of the Germans which our Government declared to be war on us. Both before and after the declaration of war by the United States, he [58] used various expressions to various persons, which, had he used them after the passage of the Espionage Act, would have subjected him to conviction of felony.

But in view of the mass of evidence of his disloyalty appearing in a certain book written and published by him in August, 1916, which has been introduced in evidence, it is really unnecessary to notice the evidence of oral expressions. The title of this book is "The War as Seen Thru German Eyes." It is about as poisonous German propaganda as was ever

fabricated. The respondent admits it was propaganda, and that it was intended to create sentiment to prevent the United States from going to war with Germany. It is a bitter denunciation of all men and nations standing in the way of German success, and a laudation of all things German. It is full of falsehoods in regard to the origin, cause and conduct of the war, and of false accusations against the allied nations and against the Government and people of the United States and the President of the United States; and the hatred exhibited in it against Great Britain and the peculiar affection displayed towards "downtrodden Ireland," are such as are rarely to be found elsewhere than in the heart of the Hun. In it respondent complains against the United States and the President, because of the sale of arms and munitions by citizens of the United States to Great Britain and her allies, and complains against the President for "Killing" the resolutions offered in Congress to warn Americans to keep off the ships of the Allies, and he justifies and applauds the murdering of 114 Americans on board the "Lusitania" when she was sunk in violation of law and in violation of the rights of every person on board. He accuses the owners of the "Lusitania" of being "guilty of this terrible calamity" because, as he charges, the [59] vessel was laden with arms and ammunition, and they "knew the submarines would lay for her"; and he denounces the United States Government as guilty because it did not "prevent any one from sailing on the doomed ship," and he denounces "the reckless passengers themselves, who disregarded the often repeated and earnest warn-

ings not only published by the German authorities, but also sent by the German authorities to each of these passengers individually." But for the murderers who committed the crime he sings a hymn of praise and says he would do as they did himself if he were in command of a submarine and had the opportunity, and that he knows "you" would do so also.

Respondent said in an article published in the "Honolulu Star-Bulletin," on August 11, 1915, which he introduced in evidence, that when he learned "that Germany had declared war upon Russia," his "First thought was to serve the Fatherland," and he "went to the German Consul here and offered his services, which were accepted"; and he further said in the same article: "Plans were already begun for starting to the front when I suffered a stroke of paralysis and was rendered blind and practically unable to move." After reading this book, in the light of subsequent events, and comparing the propaganda put forth in it with other propaganda of the German Government, the evidence is very strong that respondent permitted himself to be used as a tool by the German Government acting through its Consul in Honolulu, to disseminate its propaganda under the cloak of American citizenship, and this was the "service" to the "Fatherland" the Consul gave him to do.

It is not necessary to review the book or any of the many false charges in it against the Government and people and President of the United States. It is one hundred and forty-two pages of lying propaganda designed to stir up sentiment to embarass the Government of the United States in the conduct of our

affairs with [60] Germany and to deprive the President of the United States of the support of the American people in the correct and courageous stand he had taken in defense of American rights against outrageous German aggression. It is sufficient to say that the publication of it is sufficient evidence of respondent's disloyalty to the United States and allegiance to the German Emperor.

It is claimed that respondent had the right to publish the book. I do not believe that the right of free speech includes the right to publish any such lying propaganda even if there was no law against it at the time. However, that may be, the question is not whether respondent has violated the law, but whether he gives allegiance and fidelity to Germany. Was he with Germany or with the United States in the controversy between them preceding the war? Was he with Germany or with the United States after the war between them began? After it began respondent wished to continue to sell his book, but he was afraid it might not be safe to do so, and he requested the United States Attorney to read it and tell him whether it would be unlawful to sell it, and when the United States Attorney after having read it told him in substance that it would be unlawful to circulate it, he was not satisfied or willing to yield to the opinion of the United States Attorney, but requested that the United States Attorney refer the question to the Attorney General of the United States for his decision. It would have been giving encouragement to the enemies of the United States, the foreign enemy with whom we were at war and the

domestic enemies and traitors within our country, yet respondent wished to circulate it. This shows [61] where his allegiance and fidelity were after our country was at war.

But it is contended that the question is whether respondent renounced his allegiance in 1904, not whether he afterwards returned to it and gave it to Germany. It is true that is the question. But if after enjoying liberty in our country for ten years, respondent "recognizes an allegiance to the sovereignty of his origin superior to his allegiance to this country, it seems to me that it is not only permissible to infer from that fact, but that the conclusion is irresistible, that at the time he took the oath of renunciation, he did so with a mental reservation as to the country of his birth, and retained towards that country an allegiance which the laws of this country required him to renounce before he could become one of its citizens." U. S. vs. Wursterbarth, 249 Fed. 908. Such a Kaiserite as the evidence shows respondent to be never was sincere in his renunciation of the Kaiser.

I therefore conclude from the evidence that when respondent renounced his allegiance to the Kaiser, it was from the lips out, and that he remained attached to his former allegiance, and that in doing so he procured his certificate of citizenship by fraud, and that therefore the same should be cancelled.

(Sgd.) HORACE W. VAUGHAN,
Judge U. S. District Court for the Territory of Hawaii.

Honolulu, Hawaii, January 18, 1919. [62]

Filed Jany. 15, '19. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy.

United States District Court in and for the Territory of Hawaii.

OCTOBER TERM, 1918.

Entered in J. D. Book, folios 416–417.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK H. SCHURMANN,

Respondent.

Decree.

This cause duly came on to be heard at this term on the bill, answer and proofs; and was argued by counsel. It appearing to the Court that prior to the filing of the bill of complaint in this cause and at the time of the hearing thereof, the respondent, Frank H. Schurmann, was a resident of the city of Honolulu, District of Hawaii; that prior to December the 17th, 1904, respondent was a subject of the Imperial German Government and of William II, German Emperor; that the respondent on, to wit, the 17th day of December, 1904, in the United States of America in the State of California, county of Los Angeles, became a citizen of the United States of America by naturalization, and on said day and at said place a Certificate of Citizenship was issued and delivered to the respondent out of and by the Superior Court of Los Angeles County, which said court

was then and there a court of record having common law jurisdiction and a clerk and a seal, and having jurisdiction to issue said Certificate of Citizenship; that before bringing this suit, there was presented to the Honorable S. C. Huber, United States District Attorney for the District of Hawaii, an affidavit duly signed and sworn to by one Jeanette Ryan, which affidavit showed good cause for the institution of this suit; that before said Certificate of Citizenship was issued to the respondent, he did make and subscribe an oath before the Court issuing the same, that he would support the Constitution of the United [63] States of America, and that he absolutely and entirely renounced and abjured all allegiance to any foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government and William II, German Emperor of whom he had theretofore been a subject; that the said Certificate of Citizenship that was then and there issued to respondent as aforesaid was procured by respondent by fraud, in this: that at the time respondent made the said oath of allegiance, he falsely and fraudulently made oath that he absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government and William II, German Emperor; that respondent did not in truth and in fact at such time and place absolutely and entirely abjure and renounce all allegiance and fidelity to the Imperial German Government and William II, German Emperor, but did then and there fraudulently reserve and keep his

allegiance and fidelity to the Imperial German Government and to William II, German Emperor, and did remain under and bound by it and to it.

It is therefore ORDERED, ADJUDGED and DECREED that the Certificate of Citizenship heretofore issued to the respondent, Frank H. Schurmann, be and the same is hereby set aside and cancelled.

It is further ORDERED, ADJUDGED and DECREED that the respondent, Frank H. Schurmann, immediately surrender*ed* to this Court the said Certificate of Naturalization heretofore issued to him.

It is further ORDERED, ADJUDGED and DECREED that the clerk of this court transmit to the Bureau of Naturalization at Washington, D. C., a certified copy of this decree.

It is further ORDERED, ADJUDGED and DECREED that the clerk of this court transmit to the Superior Court of Los Angeles [64] County, State of California, a certified copy of this Decree.

It is further ORDERED, ADJUDGED and DECREED that the respondent, Frank H. Schurmann, pay the costs of this proceeding.

GIVEN UNDER MY HAND AND SEAL OF THE COURT this 15th day of January, 1919.

[Seal] (Sgd.) HORACE W. VAUGHAN,
Judge of the District Court for the Territory of Hawaii. [65]

In the United States District Court in and for the Territory of Hawaii.

OCTOBER TERM, A. D. 1918.

PETITION FOR CANCELLATION OF CERTIFICATE OF CITIZENSHIP.

UNITED STATES OF AMERICA,
Plaintiff–Appellee,

vs.

FRANK H. SCHURMANN,
Defendant–Appellant.

Notice of Appeal of Frank M. Schurmann and Order Allowing Same.

To the United States of America, Plaintiff-Appellee, and to J. J. Banks, Assistant United States Attorney, Its Attorney:

YOU AND EACH OF YOU are hereby notified that the above-named defendant and appellant, Frank H. Schurmann, intends to and does hereby appeal from the final decree of the United States District Court in and for the Territory of Hawaii entered in the above-entitled suit on the 15th day of January, A. D. 1919, to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, District and Territory of Hawaii, this 10th day of July, A. D. 1919.

(S.) FRANK H. SCHURMANN,
Defendant and Appellant.

(S.) C. H. McBRIDE,
Attorney for Defendant-Appellant. [66]

Received a copy of the foregoing Notice of Appeal on this 10th day of July, A. D. 1919.

(S.) JAS. J. BANKS,
Assistant United States Attorney,
Attorney for Plaintiff- Appellee.

I HEREBY ALLOW THIS APPEAL, upon petition of defendant-appellant and his attorney.

Dated Honolulu, District and Territory of Hawaii, upon this 10th day of July, A. D. 1919.

(S.) HORACE W. VAUGHAN,
Judge U. S. District Court for Hawaii. [67]

United States District Court in and for the Territory of Hawaii.

OCTOBER TERM, A. D. 1918.

PETITION FOR CANCELLATION OF CERTIFICATE OF CITIZENSHIP.

UNITED STATES OF AMERICA,
Plaintiff–Appellee,

vs.

FRANK H. SCHURMANN,
Defendant–Appellant.

Petition on and for Appeal.

To the Honorable HORACE W. VAUGHAN, Judge of the Above-entitled Court:

The above-named defendant and appellant in the above-entitled cause, conceiving himself aggrieved by the final decree made and entered by the above-named court in the above-entitled cause under date

of January 15th, A. D. 1919, said decree being in the words and figures following, to wit:

"United States District Court in and for the Territory of Hawaii.

OCTOBER TERM, 1918.

"UNITED STATES OF AMERICA,

Plaintiff,

vs.

"FRANK H. SCHURMANN,

Defendant.

This cause duly came on to be heard at this term on the bill, answer and proofs; and was argued by counsel. It appearing to the Court that prior to the filing of the bill of complaint in this cause and at the time of the hearing thereof, [68] the respondent, Frank H. Schurmann, was a resident of the city of Honolulu, District of Hawaii; that prior to December the 17th, 1904, respondent was a subject of the Imperial German Government and of William II, German Emperor; that the respondent on, to wit, the 17th day of December, 1904, in the United States of America, in the State of California, County of Los Angeles, became a citizen of the United States of America by naturalization, and on said day and at said place a Certificate of Citizenship was issued and delivered to the respondent out of and by the Superior Court of Los Angeles County, which said court was then and there a court of record having common-law jurisdiction and a clerk and a seal, and having

jurisdiction to issue said Certificate of Citizenship; that before bringing this suit, there was presented to the Honorable S. C. Huber, United States District Attorney for the District of Hawaii, an affidavit duly signed and sworn to by one Jeanette Ryan, which affidavit showed good cause for the institution of this suit; that before said Certificate of Citizenship was issued to the respondent, he did make and subscribe an oath before the Court issuing the same, that he would support the Constitution of the United States of America and that he absolutely and entirely renounced and abjured all allegiance to any foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government and William II, German Emperor of whom he has theretofore been a subject; that the said Certificate of Citizenship that was then and there issued to respondent as aforesaid was procured by respondent by fraud, in this: that at the time respondent made oath that he absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial [69] German Government and William II, German Emperor; that respondent did not in truth and in fact at such time and place absolutely and entirely abjure and renounce all allegiance and fidelity to the Imperial German Government and William II, German Emperor, but did then and there fraudulently reserve and keep his allegiance and fidelity to the Imperial German Government and to William II, German Emperor, and did remain under and bound by it and to it.

It is therefore ORDERED, ADJUDGED and DECREED that the Certificate of Citizenship heretofore issued to the respondent Frank H. Schurmann, be and the same is hereby set aside and cancelled.

It is further ORDERED, ADJUDGED and DECREED that the respondent, Frank H. Schurmann, immediately surrender to this Court the said Certificate of Naturalization heretofore issued to him.

It is further ORDERED, ADJUDGED and DECREED that the clerk of this court transmit to the Bureau of Naturalization at Washington, D. C., a certified copy of this decree.

It is further ORDERED, ADJUDGED and DECREED that the clerk of this court transmit to the Superior Court of Los Angeles County, State of California, a certified copy of this decree.

It is further ORDERED, ADJUDGED and DECREED that the respondent, Frank H. Schurmann, pay the costs of this proceeding.

Given under my hand and seal of the court this 15th day of January, 1919.

(Sgd.) HORACE W. VAUGHAN,
Judge of the District Court for the Territory of Hawaii."

Do hereby appeal to the United States Circuit Court of Appeals [70] for the Ninth Circuit, at San Francisco, in the State of California, from said decree, and from the whole thereof, for the reasons set forth in the assignment of errors, which is filed herewith; and said defendant-appellant prays that

his petition for his said appeal may be allowed, and that a transcript of record, proceedings and papers, upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California.

Dated Honolulu, Hawaii, July 10th, A. D. 1919.

(S.) FRANK H. SCHURMANN,
Defendant-Appellant.

(S.) C. H. McBRIDE,
Attorney for Defendant-Appellant. [71]

United States District Court in and for the Territory of Hawaii.

OCTOBER TERM, A. D. 1918.

PETITION FOR CANCELLATION OF CERTIFICATE OF CITIZENSHIP.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.

FRANK H. SCHURMANN,
Defendant and Appellant.

Order Allowing Appeal and Fixing Amount of Bond.

WHEREAS, on the 27th day of August, A. D. 1918, a bill in equity was filed instituting this suit in the name of United States of America, Plaintiff, against Frank H. Schurmann, as Defendant, for cancellation of certificate of citizenship theretofore and on the 17th day of December, A. D. 1904, issued and

delivered to said Frank H. Schurmann by the Superior Court of Los Angeles County, State of California, and whereas, said Frank H. Schurmann appeared and answered in said suit, and whereas, said suit proceeded until the entry of final decree therein on the 15th day of January, A. D. 1919, and whereas, in said final decree it was ordered, adjudged and decreed that the Certificate of Citizenship theretofore issued to Frank H. Schurmann, defendant herein, be and the same was thereby set aside and canceled, and whereas, the said Frank H. Schurmann has duly filed notice of appeal from said final decree, and whereas, the said Frank H. Schurmann desires to appeal from the said decree, and whereas, the bond hereinafter referred to has already been filed and approved by the Court, and whereas, the said Frank H. Schurmann has filed assignments of error,—

NOW, THEREFORE, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for, and it is hereby further [72] ordered that defendant-appellant may give one joint and several bond on appeal in the aggregate sum of $250.00 to cover costs of the appeal by himself, the said bond to be in form and conditioned as required by law and by the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Honolulu, District and Territory of Hawaii, upon this 10th day of July, A. D. 1919.

(S.) HORACE W. VAUGHAN,

Judge, United States District Court in and for the District and Territory of Hawaii. [73]

United States District Court in and for the Territory of Hawaii.

OCTOBER TERM, A. D. 1918.

PETITION FOR CANCELLATION OF CERTIFICATE OF CITIZENSHIP.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.

FRANK H. SCHURMANN,
Defendant and Appellant.

Assignment of Errors of Frank H. Schurmann, Defendant and Appellant.

NOW COMES the above-named Frank H. Schurmann, Defendant-Appellant herein, and says that in the record and proceedings in the above-entitled cause there is manifest error and said defendant-appellant, who has been allowed an appeal from the decree filed herein by the said Court, now makes, files and presents his assignment of errors, as follows, and upon which he will rely to wit:

1. The Court erred in entering a final decree against the defendant-appellant and in favor of the plaintiff-appellee in this suit.

2. The Court erred in finding and holding in favor of the plaintiff-appellee and against the defendant-appellant, because said holding and finding was and is contrary to the evidence, the weight of the evidence, and because there was a failure to prove the material allegations of the petition for cancellation

of citizenship certificate in this suit.

3. The Court erred in making, rendering and entering the [74] final decree in said suit upon the findings and records therein.

4. The Court erred in rendering and making its decree in said suit because said decree was and is contrary to all the evidence adduced in this suit, the preponderance of the evidence and the weight of the evidence and is contrary to law and justice, and to the facts and circumstances as stated and shown in the pleadings and records in said suit.

5. The Court erred in finding for the United States of America, plaintiff-appellee herein, and against Frank H. Schurmann, defendant-appellant herein.

6. The Court erred in holding petition for cancellation of citizenship certificate in this suit sufficient.

7. The Court erred in holding that petition for cancellation of citizenship certificate, alleging in substance insincerity in professed renunciation of former allegiance in taking oath to procure such certificate, charges fraud authorizing cancellation.

8. The Court erred in holding that publication of propaganda in the United States in favor of Germany prior to the entry of the United States into the war is evidence of allegiance to Germany on the part of one formerly a subject of the Kaiser.

9. The Court erred in holding that the desire to circulate propaganda in the United States in favor of Germany after the United States and Germany were at war is evidence of allegiance to Germany on

the part of one formerly a subject of the Kaiser.

10. The Court erred in holding that renunciation of allegiance not made absolutely and in good faith is warranted by the subsequent recognition of such allegiance.

11. The Court erred in overruling demurrer of defendant-appellant to the effect that statements made by him in the year 1918 do not and cannot constitute a ground for cancelling citizenship [75] procured in 1904.

12. The Court erred in overruling demurrer of defendant-appellant to the petition for cancellation of citizenship certificate, said demurrer being on the ground that the said petition was insufficient in that the same did not and does not contain any charge or allegation of fraud, express or implied, existing at the time of the procurement of such citizenship certificate.

13. The Court erred in finding that upon the evidence adduced on the trial of this suit defendant-appellant, at the time he made the oath of allegiance described in the opinion and decree herein, falsely and fraudulently made oath that he absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government and William II, German Emperor.

14. The Court erred in finding that upon the evidence adduced on the trial of this suit defendant-appellant, did not, at the time of taking and making the oath of allegiance described in this cause, in truth and in fact at such time and place absolutely and

entirely abjure and renounce all allegiance and fidelity to the Imperial German Government, and William II, German Emperor, and in finding that said defendant-appellant did then and there fraudulently reserve and keep his allegiance and fidelity to the Imperial German Government and to William II, German Emperor, and did remain under and bound by it and to it.

15. The Court erred in overruling defendant's oral Motion for a continuance.

16. The Court erred in overruling defendant's written Motion for a continuance.

17. The Court erred in refusing permission and motion of defendant-appellant to withdraw purported appearance and answer filed by said defendant-appellant and dated October 25, 1918, and [76] to file in lieu thereof a new answer to be filed within one hour of the time of making such request.

18. The Court erred in overruling the motion of defendant-appellant to strike all of the evidence in this suit of the witnesses Holliday, Beasley, Ludwig, and Allen, said motion being based upon the grounds, among others: (1) That the Bill in Equity in this suit to cancel certificate of citizenship was based upon the affidavit of one Jeanette Ryan, nee Mrs. John W. Ryan, whereas said Jeanette Ryan, nee Mrs. John W. Ryan, was not called by the plaintiff-appellee as a witness in this suit; and (2) this being an action founded upon fraud, the circumstances of the fraud must have been first set forth in the petition in this suit to entitle proof thereof.

19. The Court erred in admitting in evidence

Government's Exhibit "B" over the objections of defendant-appellant as follows: that the book was written and printed before the United States went into the war with Germany and has no bearing on the case whatever; that defendant-appellant was given authority by Congress to issue said book, having been a copyright therefor.

In order that the foregoing assignment of errors may be and appear of record, the said defendant-appellant files and presents the same to said Court and prays that such disposition on behalf thereof may be made as in accordance with law and the statutes of the United States in such case made and provided, and said defendant-appellant prays a reversal of said final decree heretofore made and entered by said Court.

Dated at Honolulu, District of Hawaii, the 10th day of July, A. D. 1919.

(S.) FRANK H. SCHURMANN,
Defendant-Appellant.

(S.) C. H. McBRIDE,
Attorney for Defendant-Appellant. [77]

City and County of Honolulu,
District and Territory of Hawaii,—ss.

C. H. McBride, being first duly sworn upon his oath, deposes and says:

That he is an attorney at law and a resident of the city and county of Honolulu, District and Territory of Hawaii; that on the 10th day of July, A. D. 1919, he did serve J. J. Banks, Assistant United States Attorney in and for the District and Territory of Hawaii, one of the attorneys for plaintiff-appellee

herein, with a true and correct copy of the assignment of errors herein, by leaving with the said J. J. Banks personally a true and correct copy thereof, at his office in said Honolulu, and the said J. J. Banks personally received said copy.

C. H. McBRIDE.

Subscribed and sworn to before me upon this 10th day of July, A. D. 1919.

[Seal] (S.) A. E. HARRIS,
Clerk United States District Court. [78]

Filed July 10, 1919. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk.

United States District Court in and for the Territory of Hawaii.

OCTOBER TERM, A. D. 1918.

PETITION FOR CANCELLATION OF CERTIFICATE OF CITIZENSHIP.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.
FRANK H. SCHURMANN,
Defendant and Appellant.

Citation on Appeal.

United States of America,
District of Hawaii,—ss.

The President of the United States to United States of America, Plaintiff and Appellee, and to Hon. J. J. Banks, Assistant United States Attorney, Its Attorney:

You, and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco in the State of California, within thirty (30) days from the date of this citation, pursuant to an appeal filed in the office of the United States District Court for the Territory of Hawaii, in the above-entitled proceeding, wherein Frank H. Schurmann is defendant-appellant, and under the decree filed herein United States of America is plaintiff-appellee and Frank H. Schurmann is defendant-appellant, and you, the said United States of America, plaintiff-appellee herein, do then and there show cause, if any there be, why the [79] decree entered in the above-entitled proceeding on the 15th day of January, A. D. 1919, in said appeal mentioned and thereby appealed from should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States of America, this 10th day of July, A. D. 1919.

HORACE W. VAUGHAN,

Judge of the United States District Court for the Territory of Hawaii. [80]

District of Hawaii,
Territory of Hawaii,
City and County of Honolulu,—ss.

C. H. McBride, of Honolulu, in the District and Territory of Hawaii, attorney at law, upon being duly sworn, upon his oath, deposes and says:

That he is one of the attorneys for the defendant-appellant in the within entitled cause, and that on Thursday, the 10th day of July, A. D. 1919, he did personally serve J. J. Banks, Assistant United States Attorney, one of the attorneys for United States of America, plaintiff-appellee in said cause, with the annexed citation, and the order allowing the appeal of said cause by delivering to him, the said J. J. Banks, as such attorney for said plaintiff-appellee, a full, true and correct copy of the said citation issued in the said suit, and a full, true and correct copy of the order allowing said appeal, to the United States Circuit Court of Appeals of the Ninth Circuit, and at the time of said service I exhibited to him, the said J. J. Banks, the said attorney for said plaintiff-appellee, the original citation issued on appeal in this suit, and further this deponent saith not.

C. H. McBRIDE.

Subscribed and sworn to before me at said Honolulu on this 10th day of July, A. D. 1919.

[Seal] WM. L. ROSA,
Deputy Clerk United States District Court. [81]

Service of the within citation on appeal, by copy thereof, herewith acknowledged upon this 10th day of July, A. D. 1919.

JAS. J. BANKS,
Assistant United States Attorney,
Attorney for Plaintiff-Appellee. [82]

[Endorsed]: E. No. 10. In the United States District Court for the Territory of Hawaii. United States of America, Plaintiff-Appellee, vs. Frank

H. Schurmann, Defendant-Appellant. Citation on Appeal.

United States District Court in and for the Territory of Hawaii.

OCTOBER TERM, A. D. 1918.

PETITION FOR CANCELLATION OF CERTIFICATE OF CITIZENSHIP.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.

FRANK H. SCHURMANN,
Defendant and Appellant.

Bond on Appeal of Frank H. Schurmann.

KNOW ALL MEN BY THESE PRESENTS: That we, Frank H. Schurmann, defendant-appellant in the above-entitled suit, as principal, and L. Ayau, and Lum Yee Sing as sureties, are held and firmly bound unto the United States of America, plaintiff and appellee, in the sum of Two Hundred Fifty Dollars ($250.00), lawful money of the United States of America, to be paid to the said United States of America, plaintiff and appellee herein, its successors and assigns, to which payment well and truly to be made we bind ourselves and each of us, our and each of our respective heirs, executors, administrators and assigns, firmly by these presents.

SEALED with our seals and dated in the city and county of Honolulu, in the District and Territory of Hawaii, this 10th day of July, A. D. 1919.

WHEREAS, the above-named Frank H. Schurmann, the defendant-appellant in this suit, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree in [83] this suit, made and entered up in favor of the plaintiff and appellee above named by the United States District Court for the Territory of Hawaii and duly filed in said court on the 15th day of January, A. D. 1919, by the above-named court, praying that said decree may be reversed.

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant-appellant aforesaid shall prosecute his appeal to effect and shall answer all costs to which the plaintiff-appellee may be entitled, if he fails to make good his appeal, and if he shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit in this cause or on the mandate of the United States Circuit Court of Appeals for the Ninth Circuit by the United States District Court for the Territory of Hawaii, then this obligation shall be void; otherwise the same shall remain in full force and effect.

IN WITNESS WHEREOF, the aforesaid principal and the aforesaid sureties have hereunto set their hand and seals at Honolulu, in the City and County of Honolulu, District and Territory of Hawaii, this 10th day of July, A. D. 1919.

(S.) FRANK H. SCHURMANN, (Seal)
Principal.

(S.) L. AYAU, (Seal)
(S.) LUM YEE SING, (Seal)
Sureties. [84]

The foregoing bond is approved as to form, amount and sufficiency of sureties.

Dated Honolulu, in the District and Territory of Hawaii, this 10th day of July, A. D. 1919.

(S.) HORACE W. VAUGHAN,
Judge of the United States District Court for the District and Territory of Hawaii. [85]

United States District Court in and for the Territory of Hawaii.

OCTOBER TERM, A. D. 1918.

PETITION FOR CANCELLATION OF CERTIFICATE OF CITIZENSHIP.

Plaintiff and Appellee.

vs.

FRANK H. SCHURMANN,

Defendant and Appellant.

Notice of Filing of Bond on Appeal of Frank H. Schurmann.

To the United States of America, Plaintiff-Appellee, and to J. J. Banks, Assistant United States Attorney, Attorney for Plaintiff-Appellee:

YOU AND EACH OF YOU are hereby notified that the defendant-appellant in this suit, Frank H. Schurmann, has filed in the United States District Court for the Territory of Hawaii, a bond in the sum of Two Hundred Fifty Dollars ($250.00), in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and the

names and residences of the sureties who have executed said bond on appeal in this suit, a copy of which is attached hereto, and made a part hereof, are as follows:

L. Ayau resides at #5 Matsumoto Lane and does business at King and Nuuanu Sts., in said Honolulu, and his postoffice address is P. O. Box 930; and

Lum Yee Sing resides at Nuuanu and Young Lane and does business at Kun Chan Co., Nuuanu St., in said [86] Honolulu, and his postoffice address is Nuuanu Street; and they are the sureties on said bond filed in this court in this suit on appeal from the final decree made and entered herein in the United States District Court for the Territory of Hawaii, and from which final decree the said defendant-appellant has appealed and filed his notice of appeal.

Dated, Honolulu, T. H., this 10th day of July, A. D. 1919.

(S.) FRANK H. SCHURMANN,
Defendant–Appellant,
By (S.) C. H. McBRIDE,
His Attorney. [87]

United States District Court in and for the Territory of Hawaii.

OCTOBER TERM, A. D. 1918.

PETITION FOR CANCELLATION OF CERTIFICATE OF CITIZENSHIP.

UNITED STATES OF AMERICA,
Plaintiff and Appellee.

vs.

FRANK H. SCHURMANN,
Defendant and Appellant.

Stipulation Re Transcript of Testimony.

IT IS HEREBY STIPULATED: That inasmuch as no copy was made of the transcript of testimony in this cause, the original of said transcript of testimony may be included and made a part of the record on appeal in this cause and forwarded to the Clerk of the Circuit Court of Appeals for the Ninth Judicial Circuit, and that said original transcript of testimony be returned to the office of the clerk of the United States District Court for the District and Territory of Hawaii after the record on appeal herein shall have been officially filed with the clerk of the Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated at Honolulu, Hawaii, July 10th, 1919.

(S.) JAS. J. BANKS,
Assistant United States Attorney,
Attorney for Plaintiff-Appellee,
C. H. McBRIDE,
Attorney for Defendant-Appellant.

Approved:

(S.) HORACE W. VAUGHAN,
Judge United States District Court. [88]

Filed March 11, 1919, at 3:30 P. M. A. E. Harris, Clerk. Wm. L. Rosa, Deputy Clerk.

In the United States District Court, in and for the Territory of Hawaii.

EQUITY No. 10.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Respondent.

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[90]

In the United States District Court in and for the Territory of Hawaii.

No. 10—EQUITY.

Before the Honorable HORACE W. VAUGHAN, Judge of Said Court.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Respondent.

Honolulu, H. T., October 28, 1918.

APPEARANCES:

For the United States:

Hon. S. C. HUBER, United States District Attorney, and

Hon. J. J. BANKS, Deputy United States District Attorney.

For the Respondent:

FRANK H. SCHURMANN, in Person, and Without Counsel.

Transcript of Testimony.

Mr. HUBER.—If your Honor please, in this case the answer was filed on Friday, and it is very proper at this time the case being at issue that it be set for hearing. First I would like to ask that if agreeable to your Honor and the Doctor I would very much prefer the case be not set until this hour tomorrow morning. I was expecting certain advices from the mainland which I thought would be in the mails

which reached [91—1] here the last of the week but they did not arrive, and there is about three days' accumulation of mail reached the port or would reach the port about this hour. I inquired at the postoffice this morning and the postoffice authorities said that the boat was reported in so that it would reach here about ten o'clock with three days' accumulation of mail. Upon the receipt of these advices I will know better what I wish to ask about the time for setting the final hearing of this case, and if agreeable to the Court and to the doctor I would like very much to have the matter go over until to-morrow morning.

The COURT.—Doctor, you have no attorney?

Dr. SCHURMANN.—No attorney.

The COURT.—Then it is proper that I should say some things. Of course, this is an equity case, and that being the case there is no jury and it is submitted to the Court by the evidence and on the evidence heard by the Court. That being the case it is possible to hear it at quite different times; for instance, I can hear a portion of it now and a portion some other time so that we can get all the testimony in, and I want to give you, and of course the Government both all the opportunity to present your testimony, so it was necessary that the Government wait until it was at issue, before it could be heard, so the matter being now at issue, that is, being alleged on the one side and denied on the other, we can set the case for hearing, and while we can hear part at one time and part at another time and convenience you both still we want to set it at such a time as will con-

venience both of you. Will to-morrow morning suit you?

Dr. SCHURMANN.—Yes, sir; but if you will permit me to say a few [92—2] words regarding the setting of the time?

The COURT.—Certainly, Doctor.

Dr. SCHURMANN.—This is the most serious and solemn time of my life, doubly serious because it endangers my citizenship and also endangers the lives of my wife and her unborn child. Mrs. Schurmann is to become a mother within from five to six weeks time. She is in a delicate condition, mentally and bodily, and unless this case can be adjourned until after that event has taken place, I really must fear for the worst, or unless it is taken up and put through immediately, right now, or any time within this week.

The COURT.—Why, of course, the Court will try to hear the case speedily and do everything possible and proper to accelerate the matter so that it may be heard, but the prime consideration of the Court is the arriving at the truth of the matter and arriving at justice. The main consideration that I am concerned with is to arrive at what is the truth in regard to the matter and what the Court ought to do. Of course, these outside matters or outside considerations are matters that can be taken into consideration when it does not interfere with that main purpose. Of course it may be that circumstances may be such as would justify the Court in postponing the determination of the matter until after the event of which you speak, but I wouldn't like to say so in advance, but the thing now to do is to agree upon a time for

setting it. You said you would like to have it disposed of this week, would you?

Dr. SCHURMANN.—I would very much like to; yes, sir.

The COURT.—Well, very probably it can be disposed of, I don't know, but the District Attorney says —to-morrow morning. [93—3] did you say?

Mr. HUBER.—If the Court please, my idea was not to set the case for trial to-morrow morning, but to-morrow morning to set the time for it. The situation is simply this, it is possible that the Government will require the deposition of a witness on the mainland. Now, I thought I would know that upon the receipt of the mail that should have been here already, that I thought would be here the last of last week, and which I think will be in to-day's mail or ought to be in to-day's mail. So far as the other testimony is concerned it may be we will decide we will not want that deposition but I will know when I get the mail. All the other testimony we are ready on, requiring just so much time as it will take to subpoena the witnesses. I can just as well try the case on Thursday as a month from Thursday so far as that is concerned, if agreeable to the doctor.

The COURT.—I will give all opportunity to produce testimony for both the Government and the defendant, and therefore I will pass it for to-morrow morning. Is there any testimony that you can proceed with now?

Mr. HUBER.—Yes, the only point is if it should be determined from the mail I am expecting that the deposition will not be taken that I had in mind then

we could put on our whole case and be done with it instead of have put it in piecemeal. I can say the Government will be ready by Thursday of this week barring this question of the deposition.

The COURT.—If I understand you, if you should not need the deposition you will have your case ready next Thursday?

Mr. HUBER.—Yes, your Honor.

The COURT.—The Government says he will know by Thursday whether [94—4] he needs the deposition he speaks of.

Dr. SCHURMANN.—That will suit me.

The COURT.—And if he does not take the deposition he will be ready to close his case likely on Thursday.

Dr. SCHURMANN.—All right.

The COURT.—And if he does not close the case and wishes to take the deposition he will probably take the period you suggest, in other words, it will probably take six weeks to take this deposition?

Mr. HUBER.—Yes.

Dr. SCHURMANN.—All right, very well.

The COURT.—That being the case then, this matter will be set for trial on Thursday at ten o'clock and it will be either tried and finished on Thursday or else this deposition will be taken and sufficient time given to take it, so you can get ready to meet the issue that way, Doctor.

The Court then adjourned this cause to October 31, 1918, at 10:00 o'clock A. M. [95—5]

In the United States District Court, in and for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Respondent.

Testimony of Bernhard H. Knollenberg, for Plaintiff.

Honolulu, H. T., October 29, 1918, 2:00 P. M.

Direct examination of BERNHARD H. KNOLLENBERG, for plaintiff, sworn.

Mr. HUBER.—What is your name?

A. Bernhard H. Knollenberg.

Q. And where do you reside?

A. I reside at Nanakuli, Nuuanu Avenue.

Q. How long have you resided in the Territory of Hawaii?

A. I have resided here two months—two years and three months.

Q. And what has your occupation been during that time?

A. During the greater part of that time I was an attorney, employed by the firm of Frear, Prosser, Anderson & Marx.

Q. And what is your present occupation or service?

A. I am a chief petty officer, United States Navy.

Q. And how long have you been connected with the Navy, or in the [96—6] Navy, Mr. Knollen-

(Testimony of Bernhard H. Knollenberg.)

berg? A. Since January 16, 1918.

Q. Are you acquainted with the respondent in this case, Doctor F. H. Schurmann? A. I am.

Q. How long have you known him?

A. I have known him since about the 1st of January, 1918.

Q. State whether or not during the period of your acquaintance with the respondent you have had any business association or connection.

A. I have.

Q. With him? A. Yes, sir.

Q. What?

A. I was a volunteer in the naval intelligence office, that is, I had not yet joined the Navy but was acting in that capacity simply for patriotic motives and my—the chief of the department along with all the other officers had constantly had their attention brought to Doctor Schurmann and the alleged pro-German activities which he was carrying on, and the Aide for the Intelligence asked me if I knew Doctor Schurmann or knew anything of these activities or if it would be possible for me to find out anything concerning them. At that time I had had some little trouble from continuous tennis playing on hard courts with my hip and it occurred to us that it might be a favorable opportunity for finding out Doctor Schurmann's real sentiments if I could go there and have this examination and take the regular treatment which Doctor Schurmann is in the habit of giving for various diseases and injuries.

Q. Did you take any treatments from him?

(Testimony of Bernhard H. Knollenberg.)

A. I did. [97—7]

Q. When?

A. The first treatment was on January 8th, 1918.

Q. And how many treatments did you take?

A. I took approximately half a dozen treatments.

Q. And during what period?

A. These treatments extended from January the 8th, 1918, and on until about the 1st of February, that is, they extended throughout about a month.

Q. During the time that you were taking these treatments did you have any conversation with the Doctor? A. I did.

Q. And in these conversations or in any of them, did the Doctor make any statements to you in regard to the war or the subject pertaining to the war which in any way reflected upon the question of his allegiance to the United States or his sympathies in regard to the war? A. He made such statements.

Q. You may state to the Court what these statements were.

A. Well, in my opinion the following statements were—

Q. Mr. Knollenberg, what were the statements?

A. Yes, sir. I wish first of all to ask leave of the Court to refresh my memory. This is a matter of such great importance that I desire to give the exact words of Doctor Schurmann. Each time that I took these treatments I immediately went from his office to the University Club and there wrote down my notes concerning the conversation in order that there would be no possibility of any lapse of time or of mis-

(Testimony of Bernhard H. Knollenberg.)
quoting the Doctor, and if the Court will permit I would like to refresh my memory.

The COURT.—But is that necessary? I think it is permissible if you think it is better. [98—8]

A. I think it is better, so that I can give the exact words that the doctor used to me, otherwise I would only have to give the approximate language he used.

The COURT.—Well, all right.

A. On January the 18th—the 8th, in the course of a conversation which we had,—you can readily see that while I was being treated a conversation would arise,—the doctor made the following statements: "The war is practically over, the Allies," referring to the Entente, "France and Great Britain and that alliance is simply holding out until they can throw out the sop to the people, because—"

The COURT.—January 8th of this year?

A. Of this year. Because the powers now realize how hopeless it is to ever beat Germany now, that the iron ring is broken by Russia's defection. A further statement on that day was that the Allies need expect no further help from Australia, she is through with the war.

The COURT.—When was that statement made?

A. That was on the same day, too, your Honor.

The COURT.—The same day?

A. Yes, sir. The next treatment was on January 13th, 1918. At that time Dr. Schurmann stated that, "it is hopeless for the Allies to beat Germany; peace is, therefore, now in sight any day." At the same time, Doctor Schurmann made the statement to me

(Testimony of Bernhard H. Knollenberg.)
that he was sorry he had not given a certain professor, whose name he did not give to me, one hundred copies of the book—may I ask the exact title of that book, Mr. Huber, of Doctor Schurmann's?

The COURT.—You are repeating his language, Mr. Knollenberg?

A. Of the book, and the book we had talked about was a book which [99—9] Doctor Schurmann had written, "The War Through German Eyes" is approximately the title. Now, I continue the exact language: "That he was sorry he did not give this Professor a hundred copies of the book, now that he had thought over the matter." I should state that at a previous time so as to indicate the significance of these statements, he had, it seems, been requested for one hundred copies of this book, and had not given it to them, because of fear of the Federal authorities who had given him warning not to distribute the book. On this same date, January 13th, 1918, Doctor Schurmann stated that Australia will declare her independence of Great Britain rather than furnish further aid to the war. On this same date, he gave to me a copy of a song which he had written, entitled, "It's a Long and Rocky Road to Berlin." I would put a copy of this song in evidence, if the District Attorney so desires.

Mr. HUBER.—I will call for that later, please proceed.

A. All right. The next visit was on January 16th, 1918. On this visit Dr. Schurmann made the following statement, I had better quote it here, "that he had

(Testimony of Bernhard H. Knollenberg.)

every reason to believe that there are no less than one hundred thousand Germans who have fled to Mexico, now is the time for every Mexican to show their mettle." I don't know whether it is legitimate, or whether the Court desires it, but I inserted in here the surrounding circumstances which led up to these statements, or whether you prefer to—

The COURT.—Well, the District Attorney, of course, is conducting the examination.

Mr. HUBER.—At this time, just proceed with the statements, Mr. Knollenberg. [100—10]

A. When the Dutch men-of-war—this is the second statement on the same date,—when the Dutch men-of-war "Zeeland" and "von Tompke" were in port a couple of months ago, Doctor Schurmann spoke with the officers of both vessels, of each vessel. Of course, he would say, "I spoke." Those on the "von Tompke" were anti-German, having just come from Batavia where the only news that arrives comes through Croyden, British sources. The officers of the "Zeeland" were all very pro-German, this vessel having just come from Holland, and were unanimous in saying that they were anxious to get into the war, on the side of the Germans. On this same visit, Doctor Schurmann told me of a—these are his words—"clever joke which he had recently played." He had put up one of the service flags issued by a local newspaper with three stars. The stars were for his brothers who are serving in the German army. An English friend of his advised him to take the flag down, which advice he felt he had better follow. There was again com-

(Testimony of Bernhard H. Knollenberg.)
ment at this time in which Doctor Schurmann said he felt certain that the war was about over, because of the fact that Russia had now been lost to the Allies.

The COURT.—Mr. Knollenberg, you say that you, at that time, were in the Navy, a petty officer in the Navy?

A. I was,—during the first two visits I was simply a volunteer in the office of the Naval Intelligence. I had decided to go into the work about the 1st of January, but I had not yet been sworn in.

The COURT.—Very well, go ahead with the examination, Mr. District Attorney.

Mr. HUBER.—Have you stated, Mr. Knollenberg, such of the conversation as you recall having had during these several visits [101—11] or upon the war and the doctor's sympathies and questions that would naturally reflect his allegiance? A. Yes, sir.

Q. Now, I wish you would state to the Court the circumstances under which these several statements were made, if there was anything connected with the circumstances that would make them in any way—well, just tell what they were.

A. Yes, sir. Well, I wish to say first of all that at the time I went there, there had not yet been passed this law whereby a proceeding in equity, whereby citizenship might be taken away if certain facts were proved. I say at the time I first made these visits to Doctor Schurmann there had not yet been a law passed whereby an alien could be denaturalized, and I thought that the material I would be gathering would be used toward a charge of treason, if any,

(Testimony of Bernhard H. Knollenberg.)

against Doctor Schurmann. I thought that would be the only possible charge. I had been very much incensed, because of the outcry that had been made against Germans, irrespective of what their real feeling might be, and I went to Doctor Schurmann with almost a heart of getting such evidence that I thought it possible I could get, and I went with an openness of mind that I imagine would be unusual in one working in this sort of work, because, as I say, in the first place, I thought if I did get any material it would be for such a very, very grave purpose that I was most careful not to make any leading statements or anything of that nature which might lead Doctor Schurmann on.

The COURT.—You never induced him to make any statement by anything you said, you say?

A. Exactly. I can see for a man going before a physician, or a lawyer, or any other, it is easier for him to escape than to [102—12] start an argument, and if I had made strongly pro-German statements myself, and the doctor simply chimed in, why, it would have been a different matter. I was careful to make no such leading statements myself, and while I, at no time, made any anti-German statements I at no time made pro-German statements, and these were all statements which came of Doctor Schurmann's own volition that I have here read to the Court. Furthermore, while I have given the exact words of Doctor Schurmann as I recalled them after the few minutes that it would take me to go over and jot them down at the University Club; of course, these were not all

(Testimony of Bernhard H. Knollenberg.)

of the statements that were made. These were only those which seemed to me to be of a more or less decisive and succinct nature which could be tabulated. The entire impression which I gained from Doctor Schurmann's statements was that he was in sympathy with Germany rather than with the United States. I took this testimony here, these statements here, almost a year after the United States had entered the war. I did not feel that Dr. Schurmann had an emnity to the people of the United States, or to the Government so much as he had love for Germany, which was a greater love than that which he bore to the United States. That was my entire feeling throughout this series of interviews, that he had been unable—

The COURT.—You mean that is the impression he created in your mind?

A. Yes, sir; the general impression created on my mind was that Doctor Schurmann had retained a love for Germany which was greater than his love for the United States, and that rather than any definite hatred for the United States, it was this paramount love for Germany which led him to make these statements [103—13] and to make many others of like tenor to me.

The COURT.—Did he know you were an officer in the Navy at that time?

A. He did not. I told him that I was an attorney, and I was.

Mr. HUBER.—Will you mark this as Government's Exhibit "A"?

(Testimony of Bernhard H. Knollenberg.)

Q. Mr. Knollenberg, I will ask you to look at this card marked Government's Exhibit "A," and ask you to state whether that is the poem entitled, "Its a Long and Rocky Road to Berlin," which you referred to that Doctor Schurmann gave to you.

A. Yes, sir; this is the copy handed to me by Doctor Schurmann.

Q. And did the doctor state to you at that time who the author of it was?

A. He said that he was the author.

Mr. HUBER.—The Government offers in evidence exhibit "A." You may cross-examine the witness, Doctor, if you care.

Cross-examination of BERNARD H. KNOLLENBERG.

Dr. SCHURMANN.—Mr. Knollenberg, you realize that you are under oath? A. I do.

Q. Do you recollect that during one of these interviews with me, you told me you were forgetful?

A. I am.

Q. Yes, all right, a very good admission. And didn't you apply for the Officers' Training Camp?

A. I did.

Q. Didn't you fail to pass there to become an officer? [104—14] A. I did.

Q. Why? Because you were forgetful, because you didn't know what you were saying or doing, and there you stand and make statements against me, being so forgetful and erratic.

The COURT.—You must not argue with the wit-

(Testimony of Bernhard H. Knollenberg.)

ness, Doctor. You may ask him any questions you wish, but you cannot argue with a witness on the witness-stand. You can argue with me later on, but as far as this witness is concerned now, you are permitted to ask him any questions that relate to the matters about which he testified and about which the prosecution has questioned.

Dr. SCHURMANN.—Very well, your Honor.

Q. I will ask the witness, now, if he did not admit he was forgetful, and he said, yes? A. Yes.

Q. And still forgetful, one of your failings?

A. It is.

Q. When you came to me on January the 8th, you made the statement, you said you came to me on January 8th, but you didn't come to me on January the 8th or the 9th, but you came to me on January—

The COURT.—You are not to dispute the witness' word, or argue with him on the stand. You can ask any questions, Doctor, about this matter, and if you want to, you can testify yourself when he came, but you are not to dispute with him or any thing of the kind.

Dr. SCHURMANN.—All right. Mr. Knollenberg, will you admit that when you came to me you were biased, biased because you had entered a new field of labor in the Intelligence Department there, and as a Sherlock Holmes, you wanted to make good? [105—15] A. I did not.

Q. You wanted to make good?

A. I wanted to make good, but I do not admit that

(Testimony of Bernhard H. Knollenberg.)

I was biased. I admit the second part of the question.

Q. Mr. Knollenberg, didn't your superior officers and your comrades deem you erratic in your ways and manners?

A. I don't know, as to their opinion.

Q. Mr. Knollenberg, did you not forget on various occasions to put on your leggins and omit other things there? A. I did.

Q. Mr. Knollenberg, when you came to my office, did you not commence to argue about the war with me? A. I did not.

Q. Mr. Knollenberg, wasn't almost your very first words a matter of complaint against the feeling of the people here when you stated you came from the East where the feeling against the Germans and German-Americans and those of German blood were entirely different from what they were here?

A. I did.

Q. Didn't you thereby try to induce me to say something? A. I did not.

Q. Mr. Knollenberg, did you not say that you saw my book in one of your friends' houses—

A. I did.

Q. —and that you read therein certain paragraphs? A. Yes.

Q. Mr. Knollenberg, did you not request me to sell or loan you my book?

A. I did not, I requested you to let me read your book in full.

(Testimony of Bernhard H. Knollenberg.)

Q. Did you read that book in my office? [106—16]

A. I did.

Q. Wasn't the principal reason I let you read that book because I wanted an attorney's opinion?

A. It was not.

Dr. SCHURMANN.—I have nothing further to say.

Mr. HUBER.—That is all.

The COURT.—Let me get this thing in my mind.

Q. On how many different occasions did Dr. Schurmann discuss with you or make any statements to you concerning the war, that reflected his feelings in regard to it?

A. On either four or five occasions.

Q. Either four or five occasions? A. Yes, sir.

Q. Now, when was the first occasion on which he made any statement? A. January the 8th.

Q. Of this year?

A. Of this year. He states it is the 9th or 10th, and I was not entering into an argument on that subject, but within the first two weeks of January. I thing it is immaterial to the Court. The war did not intervene in these two weeks, but January the 8th I have stated, and I think it is correct.

Q. Now, did you begin the conversation with relation to the war, or did he begin it, that portion of it that related to the war?

A. My impression is that Dr. Schurmann began that conversation.

Q. Are you sure about that?

(Testimony of Bernhard H. Knollenberg.)

A. I am sure that I made no pro-German statements. It is possible that I may have said: "Well, it is interesting war news to-day."

Q. Yes, in other words, you may have stated the subject of the war, but you did not, if I understand you, you did not make any statements?

A. What, in Court parley, would not be leading statements.

Q. In other words, you may have brought up the subject of the war, [107—17] but what you said, you say, did not induce the particular statements that he made? A. Precisely.

Q. Well, where were you when these statements were made?

A. I was in Doctor Schurmann's office, where he gives treatments.

Q. Was that the first day you were there as his patient? A. It was.

Q. Were you there, then, as his patient, at that time the statements were made were you there as his patient? A. Yes, sir.

Q. Is there really anything the matter with you?

A. Not seriously the matter. Yes, sir; there was this trouble that furnished, if I may state, a legitimate excuse for going to Doctor Schurmann.

Q. You say you did not know Doctor Schurmann before that time?

A. I did not. I knew who he was at the time; he was pointed out to me, but I did not know him.

Q. Did you pay him as a physician? A. I did.

(Testimony of Bernhard H. Knollenberg.)

Q. How long were you to go, how long were you under his care as a patient?

A. Approximately a month.

Q. Did he diagnose your case? A. He did.

Q. Made an examination of you? A. He did.

Q. Show that you needed medical—rather, that you needed the services of an osteopath?

A. I should state in all fairness to Doctor Schurmann that he stated to me: "I can find nothing seriously wrong, but I do see, however, that—" I had told him also that I had stomach trouble, which I thought might be caused by this, and he noticed, too, that I had stomach trouble. He said, "I don't note any [108—18] injury, but I am sure my treatments will be of general benefit to your health," and he was very careful in his diagnosis. Professionally I must state that Doctor Schurmann's whole attitude was one which impressed me very favorably.

Q. Yes, so you did not gain any unfavorable impression from him, from his attitude?

A. As a professional man?

Q. Yes. A. No, sir; I did not.

Q. And nothing, but what you—you felt nothing to criticise in that attitude?

A. No, sir; he seemed to be honorable in his profession, to me.

Q. Well, did you misrepresent your case to him any at all in order to become his patient?

A. I did not.

Q. In other words, you just let him examine you?

(Testimony of Bernhard H. Knollenberg.)

A. I showed him it was my—it was simply jolting on the tennis court. I play tennis almost every evening, and it was so, and I realized that if I went with something that was untrue, I would not be able to talk intelligently about it, that was the reason.

Q. Well, now, after Doctor Schurmann made that statement which you say he made that first time you went, how long after was it you wrote it down or made your memoranda of what he said?

A. It was within half an hour after I left Doctor Schurmann's office.

Q. Well, when you wrote it down, did you write the exact language that he gave you?

A. As near as I could remember it, within a half an hour, yes, sir.

Q. As nearly as you could remember it, within a half an hour after he made it. Well, now, Mr. Knollenberg, are you willing to swear positively that the statement that he did make was in substance [109—19] and effect what you have—what you did write?

A. In substance and effect I am willing to swear to it.

Q. That so far as the substance of what he said was concerned, that it is there? A. Yes, sir.

Q. And I believe, if I understand you correctly, you say that is also the words as near as—

A. Within half an hour, as I could remember in that short space of time, yes, sir.

Q. Now, let me get that statement; I did not catch the first statement you say he made. Let me get that.

(Testimony of Bernhard H. Knollenberg.)

A. "The war is practically over." On the 8th that was.

Q. What else on that day?

A. "The powers realize how hopeless it is to beat Germany. The Allies need expect no more help from Australia."

Q. That was the substance of that conversation?

A. Yes, sir.

Q. Well, was there any other statement that he made along the same lines at that time, or was that just the substance of the general statements that he made?

A. Why, I put down each time as near as I could remember, one definite statement that he made, and his conversation was of the same nature as—

Q. All right; now, when was the second time he made any statements?

A. The second time was within a week. I have noted down here that it was January the 13th.

Q. Well, when did you note it down?

A. I noted it down at the time.

Q. At the time the conversation occurred?

A. At the time I took the notes. [110—20]

Q. Well, how long was it after the conversation occurred that the notes were made?

A. Within half an hour after the completion of the conversation, the treatment, I should say.

Q. Was that also at the time when you had the treatments? A. Yes, sir.

Q. Where was that conversation, at his office?

A. At his office, the second one, too. I held no con-

(Testimony of Bernhard H. Knollenberg.)

versation with Doctor Schurmann except in his office.

Q. Did all of the conversations which you have repeated occur at his office? A. Yes, sir.

Q. And each time you made your memorandum within a half an hour, you say, after the conversation was concluded?

A. Yes, sir; that is what I wanted to say, after the treatment was concluded. It may have been that the conversation took place in the early part of the treatment, so therefore it might have been as much as an hour, but within a half an hour after the treatment was concluded.

Q. Well, do you know what brought up the subject in the first conversation? A. I do not.

Q. Do you know what brought up the subject in the second conversation?

A. No, sir; except that each time there would usually be a newspaper there and one or the other of us would come in and talk as two men normally do, talk about the war and how it is going.

Q. Well, what was that second statement now?

A. "Hopeless for the Allies to beat Germany, and that Australia will declare her independence rather than furnish further aid [111—21] to England," and he gave me a copy of the "Rocky Road to Berlin" song.

Q. That is the second conversation, the second conversation when he gave you a copy of "The Rocky Road to Berlin"? A. Yes, sir.

(Testimony of Bernhard H. Knollenberg.)

Q. Well, did he ever inquire how you felt about the war?

A. No, nor did I ever put the question to him directly: "Well, you are pro-German or pro-American," and he never asked me.

Q. But the second conversation was the 13th of January, hopeless for the Allies to win the war, after the other statements which you quoted. Have you quoted in your answers here all the conversation as you have it in your memorandum?

A. I have quoted my memorandum.

Q. I see, in your answers you quoted your memorandum? A. Yes, sir.

The COURT.—Either side can, if they wish, decide to have this memorandum filed here as an exhibit in the case. Wherever a witness has refreshed his memory from a memorandum the Court can order it filed if it is desired. Of course, if you do not, why he can keep it. All right.

Q. Now, when was the third, Mr. Knollenberg?

A. The third was on January 16th.

Q. And at his office? A. Yes, sir.

Q. And the fourth also?

A. The fourth, I do not recollect the exact date because at that time I was attempting to find out specifically about a matter with which the Department was interested in and Doctor Schurmann did not make any statement regarding it and I made no memorandum of it so I cannot state the exact date, your Honor, but it was sometime in January, however. [112—22]

(Testimony of Bernhard H. Knollenberg.)

Q. Now, just what did you say that statement was with reference to a certain professor?

A. Yes, sir, that a certain professor from Australia had requested books from Doctor Schurmann and that Doctor Schurmann had not given them to him.

Q. He said—Doctor Schurmann told you that a certain professor—did he name the professor?

A. He did not.

Q. From Australia, had requested some of his books? A. Yes, sir; one hundred copies.

Q. A hundred copies of his book?

A. Yes, sir; and that he did not give them to him because of fear of getting into trouble with the Federal Government, that he had been warned not to give them and naturally did not like to take a chance of disobeying that notification. And at a later time he told me he was sorry he had not given the books but did not state the reason for his being sorry.

Q. Now, this is two separate conversations, in one conversation with you he told you that a certain professor had requested these books and so forth, and in a later conversation, at another time, he said he was sorry he didn't let the professor have the books

A. Yes, sir.

Q. When was it—what else—did he give the reason why he was sorry he hadn't let him have the books?

A. No, but the general opinion I—

Q. I don't want your opinion, I want what he said, if he said anything, as to why.

A. No, I can't state at this time exactly what he said, if I could give my opinion I could— [113—23]

(Testimony of Bernhard H. Knollenberg.)

The COURT.—That is not permissible, if you remember what he said, all right. Do you wish to ask any further questions, Doctor?

Dr. SCHURMANN.—No further questions.

Mr. HUBER.—Nothing further.

The COURT.—That is all.

Mr. HUBER.—Now, if the Court please, in regard to the subsequent hearing, inasmuch as the time for the Government to take depositions or procure the attendance of witnesses from the mainland, it would run into the time when the doctor stated yesterday concerned his wife, and for the reason your Honor understands he would not like to begin this trial, I am willing for my case to be set at a time that will accommodate the Government, with the doctor's reason being taken into consideration, I would say that a month ought to be a reasonable time for the Government, although since learning this afternoon of the United States Attorney's illness over there it might make some little difference, as I know it is being handled by the United States Attorney personally.

The COURT.—How about Thursday?

Mr. HUBER.—No, I think it would be better from both standpoints, of the Court and the Government, in the interest of the case, that when it is taken up again it be concluded. While I know an equity proceeding, the procedure under which your Honor is hearing this case permits piecemeal testimony, it is never to the advantage of anyone connected with the trial of a case to have it tried piecemeal.

The COURT.—Well, what time do you suggest it be postponed until?

Mr. HUBER.—I would want, so far as the Government is concerned, thirty days. [114—24]

Dr. SCHURMANN.—Thirty days is not sufficient for me, because my wife will be confined in five weeks time. Either now, or shortly after Christmas she will be on her feet. I am willing to go ahead right away.

The COURT.—If it becomes necessary to take any depositions you can take the depositions, or as a matter of fact I suppose the doctor ought to know. We will continue this matter over for sixty days. [115—25]

In the United States District Court, in and for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Respondent.

Honolulu, H. T., December 23, 1918.

On this 23d day of December, A. D. 1918, an order of continuance was made, agreed to by both of the parties hereto, continuing the further hearing of this cause until the 6th day of January, A. D. 1919, at 10:00 o'clock A. M. [116—26]

In the United States District Court, in and for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Respondent.

Honolulu, H. T., January 6, 1919.

Mr. HUBER.—If the Court please, at this time I wish to offer in evidence this book entitled "The War as Seen Thru German Eyes," by Doctor F. Schurmann, the respondent in this case.

Dr. SCHURMANN.—If it please your Honor, I most respectfully make the request that before the evidence for the Government is taken I be permitted to present first my demurrer.

The COURT.—All right, Doctor, proceed.

Dr. SCHURMANN.—By this demurrer I will endeavor to show to your Honor that the Bill in Equity does not contain facts whereby this Honorable Court can take away my American citizenship. I respectfully submit to your Honor that the allegations of Mrs. Jannette Ryan in the complaint, that I in March, April and May, 1918, made statements which it may appear that I did not give up wholly my allegiance to the German government and Emperor Wilhelm, former Emperor of Germany, cannot make void the oath which I took in 1904, in the Superior Court of Los Angeles, because whatever I may have said in March, April [117—27] and

May, 1918, cannot affect my oath of fourteen years ago, and I therefore state that such allegations cannot constitute a ground for taking away my American citizenship. I do now say that when I took my oath I meant every word and sentiment uttered, and have continuously meant it, every word, and do now and forever hold sacred the oath, every word and syllable which I took in 1904. Was there anything or any reason for me to make my oath half-hearted, wasn't the relationship between America and Germany fourteen years ago of the very best, and for this Honorable Court to cancel my citizenship it must assume and conclude that when I took said oath I was then an employee of the German government and as its paid agent having knowledge or thought of a possible war between America and Germany. I respectfully submit that your Honor cannot hold because there is no such allegation in said bill and because the American people and the German people were very friendly. When I decided that it would be best for me to become an American citizen and thereupon taken said oath of allegiance my heart and thoughts were entirely American and of the American Constitution, and I thought everything American. By renouncing fidelity to the German government and voluntarily swearing allegiance to the United States of America I exchanged, metaphorically speaking, an old coat which had done a good and useful service in its days, for a newer and better one. Isn't the presumption in my favor that I took said oath in all sincerity and in a *bona fide* manner, and this presumption is good until the con-

trary is shown and proved by words, actions or deeds of mine to the contrary which must have occurred on or about December 17, 1904. I respectfully submit that this court cannot so hold because of no evidence [118—28] whatever and because of the circumstances and conditions in favor of my contention that I took said oath in all sincerity and in a *bona fide* manner on December 17, 1904. To illustrate my contention I will renew another simile. Circumstances already compelled me for years to smoke an Owl cigar, a good enough weed when you can't afford to buy a better one. I don't wish to say anything derogatory against the Owl cigar. More favorable circumstances gave me access to the Bobby Burns. Would I, or you, or anyone go back to the Owl or Pittsburg stogie when you had a better weed, a Bobby Burns or a delicious Havana? No, it is against human nature. If Mrs. Ryan had stated that I made derogatory utterances against the United States of America at the time I took my oath of allegiance, December 17, 1904, then it would be different, but not so, it was fourteen years afterwards, and therefore I contend that all of these allegations of Mrs. Ryan or of any of the witnesses you may produce cannot be heard against me on these allegations. The said allegation and testimony may be used against me perhaps on a trumped-up criminal charge as for the purpose of taking away my American citizenship. And had I falsified—offered witnesses to falsify as to the term of my residence in America, as was done in the case of Johansen against the United States, 225 U. S., page 227, or had my witnesses not appeared

in open court to testify in my behalf, as was done in United States vs. Nesbit, Fed. Report 168, page 1005, or had I not resided continuously in the United States for the required period as was done in United States vs. Simon, Fed. Reporter, folio 170, page 680, or had I not completed the proper time of residence before taking out my first papers, as happened in United States vs. Luria, Folio 184, Fed. Reporter, [119—29] 643, or had I induced another person to take my oath, as was done in United States vs. Mausour, 671 Federal Reporter, 170, then I say my papers should be cancelled, but you have not shown, nor will you ever be able to produce evidence that I did not fully comply with the requirements and conditions which the United States demands from its applicants for citizenship. But now comes what appears to me as the most important ruling of the United States Court supporting my contention, and that is this, in United States vs. Spohrer, folio 175, Federal Reports, page 448, the following appears: (Reading:) "That it must be made to appear that fraud was practiced in the very act of obtaining the judgment." Can your Honor then cancel my certificate of citizenship on the affidavit of Mrs. Ryan or on the testimony of others who did not even know me fourteen years ago? Does Mrs. Ryan or the other witnesses claim that the alleged derogatory statements of mine were made at the time of obtaining the judgment, that is, fourteen years ago? To make affidavit against me, should not Mrs. Ryan have stated that I made statements on or about December 17th, 1904, and not in 1918? Furthermore, the said Bill in Equity does not contain

the express charge or allegations against me as were given in the cases recited, and for this reason it is also demurred. Therefore I respectfully ask that your Honor sustain my demurrer, and rule for me.

Argument by Mr. Huber.

The COURT.—I overrule the demurrer, proceed with the evidence.

Mr. HUBER.—I now renew the offer on the part of the Government to place in evidence this publication entitled, "The War as Seen Though German Eyes," A Perspective, by Doctor F. Schurmann, the respondent in this case. [120—30]

Dr. SCHURMANN.—I object. That book was written and printed before the United States went into the war with Germany and has no bearing on the case whatever. I was given authority by Congress, a copyright of the book. It has been circulated through the mail, and was printed by the "Star-Bulletin" here, who would be liable to accusation also if that book had any bearing on the case whatever. It states plainly it does not mean through my eyes, but is extracts from American papers principally, and has nothing to do with this case whatsoever.

Mr. HUBER.—I have laid no predicate for this book. I supposed he would admit the authorship.

The COURT.—Of course the objection of immateriality is invalid. Do you admit writing the book?

Dr. SCHURMANN.—Yes, sir.

The COURT.—The objection is overruled, and the book is admitted on the admission of the doctor that he wrote the book, which dispenses with the necessity

of having to prove that you wrote it. You *write* the original and had the book printed?

Dr. SCHURMANN.—Admitted, your Honor.

The COURT.—Then the book is admitted.

(Admitted in evidence as Government's Exhibit "B.")

Testimony of R. E. Holliday, for Plaintiff.

Direct examination of R. E. HOLLIDAY, for plaintiff, sworn.

Mr. HUBER.—What is your name?

A. R. E. Holliday.

Q. Where do you reside?

A. Pahao Avenue, Kaimuki.

Q. How long have you been a resident of Honolulu and the Territory of Hawaii? [121—31]

A. Over two years, two years the 25th of December last.

Q. What is your occupation? A. Accountant.

Q. By whom are you employed?

A. Audit Company of Hawaii.

Q. And how long have you been in their employ?

A. Almost two years.

Q. Are you acquainted with Doctor Schurmann, the defendant in this case? A. I am.

Q. How long have you known him?

A. Since March, 1917.

Q. During any part of the time that you have been a resident of Honolulu did you live at the residence of Doctor Schurmann? A. I did.

Q. During what period?

A. March to August.

(Testimony of R. E. Holliday.)

Q. Of what year? A. 1917.

Q. I will ask you, Mr. Holliday, whether during your period of acquaintance with the doctor you at any time entered into a conversation with him or a discussion of the European war? A. Many times.

Q. And were those discussions or conversations of such a character as would tend to show the doctor's attitude on the war and the questions involved in the war? A. They were.

Q. Where were such conversations had?

A. In my room, or in his operating-room, or at his meal table, or on the lanai.

Q. That is the house where you were then rooming or residing? A. At his house; yes.

Q. And where was that?

A. On Beretania Street.

Q. Do you at this time recall any of the particular statements that the doctor made in *this* conversations that would have a [122—32] bearing upon the question of his allegiance or lack of allegiance to the United States? A. Yes, sir.

Q. You may state to the Court—and Mr. Holliday, let me ask that you fix as near as you can the time and place for the benefit of the doctor.

A. On Easter Sunday, in the latter part of the afternoon Doctor Schurmann and I had quite a heated argument—

Q. What year was that?

A. 1917, Easter Sunday, 1917, relative to the acts of von Bernstorff, and I contended that von Bernstorf had defiled all the ethics of honor in connection

(Testimony of R. E. Holliday.)

with his acts whilst Ambassador of Germany to the United States, and Doctor Schurmann upheld von Bernstorf saying that anything that von Bernstorf did or anything that Germany did was justified by Germany's right to be supreme; that, in other words, Germany could do no wrong in her pursuit for the power to which she was entitled, and at the same debate came up the question of the justification of the sinking of the "Lusitania," and we had some pretty heated talk about it because Doctor Schurmann upheld it declaring the inhumanity of it must be forgotten in the fact that Germany was striving for her rights, and again anything she might do or had done or would do was justified along the lines that Germany could do no wrong.

Q. Do you recall anything else that would have a bearing upon the line of this inquiry in that particular conversation on Easter Sunday of 1917?

A. Well, we had quite a long argument, I imagine it must have taken anywhere around an hour and a half or two hours. The whole gist of the talk was that America was wrong in entering [123—33] the war and Germany was right in all she might do. Doctor Schurmann was especially quick to justify von Bernnstorf in his actions, and any of the actions that Germany had done.

Q. Do you recall any other particular conversation?

A. We had so many—of course until America went into the war I, being a Britisher, it was all to the effect that Germany was justified in all her acts of

(Testimony of R. E. Holliday.)

cruelty against the British and in her aerial raids being justified because Germany was fighting for her proper place in the world as the supreme ruling nation. His was the question of the right of Germany to be supreme, not individually the question whether I was right or wrong, but that the nationality of Germany should be supreme.

Q. Did you at any time discuss with the doctor his publication of "The War as Seen Through German Eyes" or did he at any time make any comment to you on it?

A. Doctor Schurmann gave me the book, but as it was written before the war I was not very much interested. I knew the attitude of Germany, and I had read several of the articles that were in that book from other papers, but a discussion as to that book I don't think came up between us except that I condemned it as being bad taste on the part of Doctor Schurmann bringing the American side to boost the war for Germany, and on Easter Sunday, too, there was a picture of the Kaiser in the room, and I think that was a few days after Germany declared war, and I requested the doctor to remove the Kaiser's picture. I think it hurt the doctor's feelings; I know it did, and I brought it up then that the Kaiser had no interest for Doctor Schurmann nor he for the Kaiser. He made the remark, "Well, that's the Kaiser," and I said, "Well, to hell with the Kaiser," and with that Doctor Schurmann took him out of my room. [124—34]

Q. He did what?

(Testimony of R. E. Holliday.)

A. He took the picture out of my room.

Q. Whose room was this in?

A. In my room, it had been turned to the wall, I had the face of the picture turned to the wall.

Q. Let me refresh your recollection, Mr. Holliday, and ask whether you recall a conversation with Doctor Schurmann in regard to this book wherein you spoke of his publishing these articles or some of the articles you had seen elsewhere and so on, when he himself added some comment?

A. We had several conversations about it, but my recollection is not very clear as to the purport of these arguments except that I claimed that Doctor Schurmann had written the book not as an excuse or anything but merely as an excuse to boost the war because it contained nothing therein but pro-German propaganda, no military arguments or ethics of commerce or anything like that, it was just a pro-German propaganda edition.

Q. Mr. Holliday, do you know of any activities of any kind of the doctor in regard to the war or any evidence of such activities having been called to your attention by him?

A. I know that the doctor showed me a gold and enameled cross given to him by the Sinn Fein Society of New York. It was given to him for services and loyalty to that society and for the propagation of its ambitions or whatever its aspirations were. He showed me that cross and wore it for quite some time.

Q. Do you know from whom that was received?

(Testimony of R. E. Holliday.)

A. From the Sinn Fein Society, Jeremiah O'Leary Society.

Q. When was it that the doctor showed you that cross?

A. That was also Easter Sunday. I believe he received it on [125—35] Easter Saturday.

Q. Of 1917? A. Of 1917.

Q. Did the doctor state to you the particular character of the services he had rendered that were so recognized?

A. No, but he said it was not given to him for nothing.

Q. Describe that emblem.

A. It is in the shape of a maltese cross, that is, a square cross. On top it bears the words, "Sinn Fein" and underneath two dates, I forget—1701, I think, I wouldn't be sure of the two dates. The cross is gold base with green enamel, I should say about two inches square.

Q. Did you see the doctor wear this emblem?

A. Oh, yes, he wore it quite openly for some time.

Q. Knowing the nature of this inquiry as indicated by the questions already asked you, Mr. Holliday, do you at this time recall any other conversation or any conduct on the part of the defendant that came under your observation?

A. Prior to America going into the war, of course his arguments were all against Britain and the impossibility of the Allies winning the war. After America came into the war it was first that America had made an error in coming into the war, and then

(Testimony of R. E. Holliday.)

it was still impossible to beat Germany. Of course, we used to get pretty hot and I used to have to leave because I am hot-headed and the doctor was very vehement and we used to have to discontinue it, but Doctor Schurmann always took the attitude of upholding Germany. I never heard him say anything detrimental to any individual like President Wilson or anything like that, but it was very apparent that his attitude was for Germany and all his heart wrapped up in Germany, and that was why I used to ask him what was the idea of being [126—36] an American citizen when every iota of his being was German and was for Germany. I never met a more able defender of Germany's wrongs or a greater enthusiast for Germany's place in the world than the doctor, that is, the peculiar position I think he took, being an American citizen and upholding Germany in everything.

Mr. HUBER.—You may cross-examine.

Cross-examination of R. E. HOLLIDAY.

Dr. SCHURMANN.—Mr. Holliday, did you ever read my articles which were published in the "Star-Bulletin" in 1915? A. In 1915, doctor?

Q. They were published in 1915.

A. I was not here then.

Q. I know, but did you ever read them? Did I not hand you some papers to peruse?

A. I believe you did write some, I believe I read them, but of their contents I am not sure now.

Q. I will refresh your memory; would you not find that I never spoke of the super-man of Germany, that

(Testimony of R. E. Holliday.)

I stood all the time for justice of all nations, that I condemned Germany for invading Belgium?

A. Doctor Schurmann, you condemned Germany for nothing; no, sir, you were for the super-man of Germany, and you defended her for her rape of the Nuns, and you defended the shooting of Edith Cavell.

Q. Do you recollect that I showed you a letter from my father in which he condemned me for looking at things from British eyes? [127—37]

A. No, he did not, he condemned you for not being over there fighting. You never saw anything through British eyes, you know that is where our heated arguments were.

Q. Do you recollect I showed you in a paper how my father condemned me for taking this attitude of justice? A. I do not.

Q. And that I condemned the invasion of Belgium?

A. The only letter I remember you showing me, as you say was written by your father, was one where he said your two brothers were in the war and he was hurt that you were not there. No, you never showed me a letter where he condemned you for looking at things through British eyes.

Q. Mr. Holliday, you mean that you have forgotten—

A. No, I would never forget that, because it would be such anomaly that I would have it impressed on my mind.

Q. The "Star-Bulletin," in which I plainly stated that Germany should retire from Belgium, that I

(Testimony of R. E. Holliday.)

even asked for a plebiscite in Alsace-Lorraine, and asked that again, I asked that in 1914 and wrote a letter to the President?

A. Well, I don't know, I wasn't here until 1916.

Q. I showed you those letters?

A. You did show me various clippings, yes, and I read the clippings, and if you have them now I can possibly refresh my memory. But you wrote the War Through German Eyes after you wrote these other things, you are diametrically opposite.

Q. The whole gist of it is this, that you being British, and I have no great love for Britain, I admit that, but you can never say that I said one thing against the United States of America?

A. Not individually, no, you condemned the United States of America for entering the war, and you did most emphatically [128—38] uphold the sinking of the "Lusitania." That was one thing, Doctor Schurmann, where you called me a British spy, when I went after you for that, for the sinking of the "Lusitania" you upheld, saying she carried ammunition.

Q. Was the "Lusitania" an American ship?

A. That is entirely incompetent; she was carrying American citizens.

Dr. SCHURMANN.—That is all. I am standing up for the United States, not Great Britain. [129—39]

Testimony of Mary Jane Beasley, for Plaintiff.

Direct examination of MARY JANE BEASLEY, for plaintiff, sworn.

Mr. HUBER.—What is your name?

A. Mary Jane Beasley.

Q. And where do you live? A. Honolulu.

Q. How long have you been a resident of Honolulu? A. About six years.

Q. Do you know Doctor Schurmann, the defendant in this case? A. Yes.

Q. How long have you known him?

A. I only know him two months, where I stayed, it was at his place.

Q. When did you stay at his place?

A. I think last September I left, I was there two months.

Q. 1917 or 1918? A. One year back.

Q. What were you doing while you were staying there? A. I was housekeeper.

Q. Who employed you?

A. Mr. Schurmann employed me.

Q. Now how long did you work for him as housekeeper? A. Two months.

Q. During the time you worked for him did the doctor say anything to you about the purchase of Liberty bonds? A. Yes.

Q. What did he say, tell us.

A. When I took my wages I said I was going to buy some Liberty bonds, and Doctor Schurmann, I thought, was going to knock me down. He flew in such a temper he wouldn't pay me for a long time.

(Testimony of Mary Jane Beasley.)

He stood there ten minutes calling me down, saying, "What do you want to buy Liberty bonds for?" He says, "You don't want to buy [130—40] Liberty bonds for," and so he paid me and I went away. The next morning he called me up when I was having my breakfast. He called me up and he said,—I said, "What do you want?" and he said, "Wash that soap bowl," I said, "I have washed it"; "Wash it again." I said, "Can't I have my breakfast?" and he said, "You had it," so I washed it and I went downstairs again and I wasn't down a minute when he called me up again, and I said, "What do you want?" and he said, "Fetch me water." I fetched him water, and then he kept on for the whole month, tormented me to death.

Q. What had his attitude been to you prior to that time?

A. Oh, good up until the time I said I was going to buy Liberty bonds, and that's what done the job.

Q. Now, did he say anything else about bonds than what you have said? A. No.

Q. Let me refresh your recollection; did he say anything about the value of the bonds?

A. Oh, yes, that's right.

Q. What did he say?

A. If you buy a hundred dollars worth of bonds you will have to sell them for fifty dollars.

Mr. HUBER.—That is all.

(Testimony of Mary Jane Beasley.)

Cross-examination of MARY JANE BEASLEY.

Dr. SCHURMANN.—Mrs. Beasley, were you with me in September, 1917, or September, 1916?

A. Well, one year ago.

Q. I think myself that Mrs. Beasley was with me in 1916, long [131—41] before the United States entered the war, and England was at war with Germany, and if you refresh your memory you will find that is true. Where did you spend last Christmas?

A. At the Melville. I left you just before then.

Q. That was 1918 or 1917? 1917, Christmas, you spent 1917 Christmas there?

A. Not this year, but a year ago I spent it at the Melville, and I went there about a month after I left you.

Q. When was it that you came to my house, can you recollect that? A. I told you once, did I not?

Q. What date did you enter my employ?

A. I really can't say what day it was, but I was with you two months.

Q. How long was the war going before you came to me, how long since Great Britain went into war with Germany was it, about two years?

A. Something like that, I think.

Q. Did you ever buy Liberty bonds, did you buy any Liberty bonds?

A. That's nothing to do with you whether I did or not.

Q. I am asking you.

A. That has nothing to do with you if I bought or not.

(Testimony of Mary Jane Beasley.)

The COURT.—Answer the question, Mrs. Beasley.

A. That has nothing to do with him whether I bought them or not.

Q. But that is a matter for the Court to decide.

A. If I like to buy Liberty bonds I'll buy them, I am not going to tell everybody.

Q. Well, you must answer that question, did you buy any Liberty bonds?

A. Never mind whether I did or not, I am not likely to tell people what I did. [132—42]

Dr. SCHURMANN.—I must repeat the question, as I never heard Mrs. Beasley say anything about Liberty bonds, I would like to know, did you buy bonds?

A. That's nothing to do with you.

The COURT.—Mrs. Beasley, this is a matter that whenever you are asked anything by the Court you must answer the question or I will have to fine you severely. You must answer the question or pay a fine, that is material.

A. I was putting on my hat and jacket and I was going out from Doctor Schurmann's house after he paid me the day that—

Q. But the question now is, Did you buy Liberty bonds yourself?

A. My son has bought them for me.

Q. My—what is that?

A. My son has bought two hundred and fifty dollars for me.

Q. The question is, Did you buy any?

A. No, but I was going to buy them and my son

(Testimony of Mary Jane Beasley.)
bought them for me, two hundred and fifty dollars worth.

Dr. SCHURMANN.—That is all, Mrs. Beasley. [133—43]

Testimony of Janet Ludwig, for Plaintiff.

Direct examination of JANET LUDWIG, for plaintiff, sworn.

Mr. HUBER.—What is your name?

A. Mrs. Janet Ludwig.

Q. Where do you live?

A. 1536 Kewalo Street.

Q. And how long have you resided in Honolulu?

A. One year and three months.

Q. Do you know the defendant, Doctor Schurmann? A. Yes, sir; I do.

Q. How long have you known him?

A. I have known him for—I went to work for him the 27th of March and stayed there until the 1st of October.

Q. What year? A. 1917—1918.

Q. Now, is that the period you knew him, did you know him before you went to work there?

A. No, sir; I did not.

Q. In what capacity did you work for Doctor Schurmann? A. Housekeeper.

Q. Did you work for him continuously from March until October of this year? A. Yes, I did.

Q. Now during that time did you have any conversation with the doctor relative to the war and his attitude toward the war?

(Testimony of Jane Ludwig.)

A. We were always talking about the war, but as he stated in the first place he thought my name was probably German but I told him I was not. Well, I don't know why he talked to me the way he did but his attitude was always for Germany at all times.

Q. Now, Mrs. Ludwig, you say his attitude was always for Germany. [134—44] Now what was the attitude that caused you to reach that conclusion, that is what the Court wants to know.

A. Well, when I went there at first he gave me his book to read, "The War as Seen Through German Eyes," and he told me I could read it any time I wanted to. He also told me he had smuggled these books over to Australia. In his front room on Beretania Street he had quite a number of the Kaiser's pictures, and he had them also in the room on Union Street. I did not like the pictures, and I told him there would be trouble with the roomers, that they wouldn't like the pictures, but he kept the pictures in these rooms until one day a soldier and a sailor came to room there and they told me to tell the doctor to take them down or they would smash them. I carried the message to the doctor and the doctor asked my advice about it and I told him it was the safest to take them down. He said he would fool them. He showed me some uniforms in a small room around on Union Street, stating that they were German uniforms. I asked him whose they were, and he said his own.

Q. You asked what?

A. I asked him whose they were and he said his

(Testimony of Jane Ludwig.)

own, and he prized them very highly but if the public should find out that he had them the chances were that he would be punished. He continually would ask me if I had seen the paper and what the news was, and if the Americans were winning. In the first place did he say that America was doing wrong, doing the wrong thing to venture into the war because she could never win as Germany had supplies and ships that would last for years to come. He would study all the news, and when the papers would state that the Americans were winning, he said, "There is another pack of damned lies, the American papers are nothing but liars." When [135—45] the papers would state that the Germans was winning he would say, "I told you so, no country can whip Germany." Well, as time went on, the pictures were being shown at the "Bijou" by Ambassador Gerard and the papers were full of news concerning these pictures and he did nothing but walk around very much excited stating it was nothing but a pack of lies. He said that evening that he would go down and see the pictures himself, he made this remark to a friend, not to me, but I was very near.

Q. Did you yourself hear him, Mrs. Ludwig?

A. I did hear the remark?

Q. Yes, don't tell anything but what you heard yourself.

A. Well, he didn't tell it to me, but I heard the remark. He said, "I will go down to the show myself to-night," which he did, and the next morning I heard him making the same remarks again regarding

(Testimony of Jane Ludwig.)

the show, and he said of course it was nothing but a pack of lies, there was never any such a thing ever carried on in Germany. Oh, well, he said several things in regard to that. He stated on his way home there was quite a crowd of men followed him cursing him and spitting on him, that angered him very much, and he said, "If I had had that hand bomb I instructed you to make I would have carried it in my hip pocket and when they showed these pictures and that crowd commenced to hiss and roar at me I would have taken that bomb and thrown it into that damned crowd and blown those sons-of-bitches all to hell, just what they needed."

Q. When did you hear him make that statement, Mrs. Ludwig?

A. While the pictures were going on at the "Bijou," I can't tell you exactly the date, it was the morning after he saw the pictures, though. [136—46]

Q. Where was he when he made that statement?

A. Just outside of my room.

Q. In his house on Beretania Street?

A. Yes. Oh, he told me many times never to waste my money on Liberty Bonds. He told me also that he was going to contrive some way to get over to Mexico, that he knew then that he would be all right. He also stated that if he could possibly get over to Germany he intended to be a surgeon in the hospitals there. I did not stay very much longer after that because I had reasons of my own and I think he mistrusted me as being a spy.

(Testimony of Jane Ludwig.)

Q. Do you recall anything else, Mrs. Ludwig, on the line of this inquiry? Let me ask you this question: Did all of these statements you testify as hearing the doctor make, were all of these statements made in and about his home in Beretania Street?

A. They certainly were.

Q. And during the period you worked there?

A. Yes, sir, they were.

Q. Have you any children, Mrs. Ludwig?

A. Yes.

Q. What are they doing?

A. One belongs to the 82d Infantry, and the other works at Pearl Harbor, in the Supply House.

Mr. HUBER.—That is all, you may cross-examine.

Cross-examination of JANET LUDWIG.

Dr. SCHURMANN.—Mrs. Ludwig, do you recollect that your son, a [137—47] soldier in the United States of America, in the army of the United States, was a frequent visitor at my house? A. Yes.

Q. Did I not always treat that boy most handsomely and with respect?

A. Yes, you did in some ways, but you always passed some slighting remark, "I hope you win."

Q. Did I not entertain other soldiers in my house all the time?

A. You surely did, but you refused—

Q. Answer the question.

A. Yes, sir; you did.

Q. Did I not always treat these boys right?

A. I presume you probably did, while you were there.

(Testimony of Jane Ludwig.)

Q. Did I ever say anything to the soldiers to this effect, that they shouldn't fight for the United States?

The COURT.—Don't exhibit any temper towards the witness, Doctor.

Answer the question.

A. Read it again, please.

(Last question read.)

A. I couldn't say that you did, in my presence.

Dr. SCHURMANN.—Did I not, on the contrary, advise them to do their duty all the time and forever?

A. Well, if you did I didn't hear it.

Q. Do you perhaps recollect that I told you of a young Englishman by the name of Singer who roomed in my house, and I helped him to get away to Serbia because I admired his patriotism, no matter whence they came?

A. No, Doctor, I never heard that.

Q. Did you ever hear me say anything derogatory towards the United States?

A. I can't say but what you did many times, really, you said your heart and soul was with Germany and why wouldn't it be there [138—48] when all of your relations were fighting in the war.

Q. Did I ever say to you that I did not believe America would win?

A. You said that the Americans would not win, that the papers were full of lies, the American papers were nothing but liars.

Q. Did you ever mention to me the question of

(Testimony of Jane Ludwig.)

Liberty Bonds at all? A. Oh, yes, Doctor.

Q. When, and on what occasion?

A. Oh, many times I told you if you would just pay me a little more wages I might probably buy some Liberty Bonds, but when you paid me twenty dollars a month and I had to eat out of that twenty dollars a month I never had nothing left for Liberty Bonds or nothing else, therefore each one of my boys has bought Liberty Bonds.

Q. Were you not perfectly satisfied with the money you were getting from me?

A. No, Doctor, I was not.

Q. Did you ever entertain thoughts of buying Liberty Bonds? A. Why, yes.

Q. May I ask you what you did with the money?

Mr. HUBER.—Object to that as immaterial.

The COURT.—Yes, it is entirely immaterial.

Dr. SCHURMANN.—That is all. [139—49]

Testimony of Henry Allen, for Plaintiff.

Direct examination of HENRY ALLEN, for plaintiff, sworn.

Mr. HUBER.—What is your name?

A. Captain Henry Allen.

Q. Where do you live?

A. In the Elite Building.

Q. In Honolulu? A. Yes.

Q. How long have you lived here, Captain?

A. About fifteen years, that is, since I have been here the last time.

Q. What business are you engaged in now?

(Testimony of Henry Allen.)

A. The protective agency of Hawaii.

Q. Do you know Doctor Schurmann?

A. Yes, sir.

Q. How long have you known him?

A. Well, I have known the Doctor some years, I guess I know the doctor anyhow since about 1912 or 11.

Q. Did you ever live at his house or have a room at his house?

A. Yes, I lived in his place and had treatments in his place or business with his place.

Q. When was that, Captain?

A. Well, that would be in—I suppose 1913 or 1914, but I have had treatments with him and roomed there on three occasions, I think.

Q. Well, have you known him since the outbreak of the present war? A. Yes, sir.

Q. Have you ever heard Doctor Schurmann say anything, Captain, which would show or tend to show his attitude toward Germany in regard to the war, or his attitude towards the United States?

A. Well, him and I have had many heated arguments about the war. [140—50]

Q. About when did these arguments begin?

A. Well, I should say just after England entered the war with Germany we had many heated arguments, and also about the sinking of the "Lusitania." I been a sailor, and of course the Doctor knowing that I have sailed out of Germany quite awhile and in fact I been in German ships, and just as I remember, as near as I can get at it the first arguments we had

(Testimony of Henry Allen.)

commenced about, well, I will say it the other way, the first suspicion I had of the doctor was when the iron crosses and subscriptions for the iron crosses was got up here through Doctor Schurmann.

Q. Do you remember about when that was?

A. Well, I can't really tell you exactly what time that was but you could easily find out, because in the laundry, in that Chinese laundry down on Union Street—also in the "Star-Bulletin" he had an advertisement or an article put in by Doctor Schurmann where the iron cross, a certificate of an iron cross, rather, would be given to anyone who would contribute funds to the Red Cross of Germany. Now, why I am so sure about this is, I called my adopted boy at that time, I called him and I says now—

The COURT.—Captain, you can't relate any conversation between yourself and someone else unless Doctor Schurmann was present.

A. He comes in right after this. All right. When I seen this article, I sent my boy up, with as near as I can recollect, five dollars to contribute to the Red Cross and also for this Iron Cross certificate. Apparently my boy went up there and he gave him the money but when he came back he didn't have no receipt and he didn't have no Iron Cross certificate, so I said to him that didn't exactly look right to me. [141—51]

The COURT.—You are not supposed to relate the transactions between yourself and your boy; cut out all of this.

A. I went to the doctor and I asked the doctor, I

(Testimony of Henry Allen.)

says, "See here, Doctor, did that boy of mine give you any money?" and he said, "Yes, he give me some money, but, he says, "We have no certificates, Allen," but he says, "Here, do you want your money back?" and I says, "No, not at all, Doctor, but I do want to know that it is going to the Red Cross. Now, it is immaterial to me but I want your word that it is going to the Red Cross, as long as I know it is buying bandages and medicine it is immaterial to me what Government or country is fighting as long as it is going to the Red Cross." Now, I went away, and of course naturally I didn't exactly like the proceeding, and after this we had several arguments and I kept the doctor more or less under suspicion because his arguments were about going into the war and about the placing the war zone around the British Isles, and me being a sailor and of course I naturally was interested, and when the "Lusitania" went down he told me, he said, "Allen," he says, "Of course it's just like this," when I told him about the war zone,—"the international law, I don't see where Germany, if I am the master of a ship couldn't dictate a course to me or any other seaman what cares to sail, and I think it's wrong," and he said, "Well, I'll tell you now, it's just like this, Allen, for the 'Lusitania,' of course she's gone, and lives lost and property lost, and if we are wrong all is fair in love and war, if we are wrong we will pay for the loss of the lives and property."

Mr. HUBER.—If we are wrong?

(Testimony of Henry Allen.)

A. Yes, he meant if Germany was wrong, but he said, "If we are wrong."

Q. Yes?

A. So I am not so sure, but I think about that—I don't know [142—52] whether I ought to bring in —well, after that we had several arguments and talks because the doctor is a socialist and all his conversations with me and books are more or less on socialism, and his remarks about the great Socialist, Tolstoi, of course we had arguments and heated ones at that, until when Germany begins to get short of brass and saltpetre, because I have carried cargoes of saltpetre for Hamburg and Bremen and Cuxhaven, and then the doctor would say, "Well, you are getting no news, Allen; you are not getting the right news in this thing," but the news apparently that I would have to look up would be Hearst's papers and not magazines or anything like the "Outlook." Anything I suggested nevertheless the doctor used to take these magazines but he didn't apparently believe in me reading them. Now, coming down about the brass and saltpetre, as I was telling you, one time he called me across the street as I was going up Beretania Street and he called me over. It was in the evening, I remember quite well, and he said, "Allen," he said, "You are talking about saltpetre and how we get saltpetre," and he read me a poem as he said he composed. Well, that poem I believe appeared to me to be obscene. I walked away, and after that,—I believe I was stopping there at the time, but after that he called to me again over this matter with a

(Testimony of Henry Allen.)

friend of mine, we were always having arguments about the war but this friend of mine he happened to state, he was a friend of mine, and apparently he thinks so yet, and also the doctor, but he come over to me to my house. Now I want to say this, that the time as near as,—there is something happened that I must know and remember, about the middle, or at least the latter end of May, or it may have been the 1st or 2d of June— [143—53]

Mr. HUBER.—Of what year?

A. 1917.

Q. Yes?

A. There is a friend of mine stayed over in my home and he had some business to do down at Mr. Nelson's, the sailmakers that lived right abreast of the doctor's home on the corner of Union and Beretania Street, so he says, "Will you take a walk down with me, Allen, towards Nelson's, I got a little business there for Mr. Richards—"

Q. Well, did you see Doctor Schurmann?

A. Well, I haven't got to his home yet, but I am leaving my home.

The COURT.—Mr. Allen, cut out all the nonessentials and come down to facts now, anything that Doctor Schurmann said to you.

A. I was giving that, that was this man, and that man was there, and the doctor evidently wanted to know who this man is. Anyhow, I went to Mr. Nelson's place, and coming out of Mr. Nelson's place the doctor was sitting on the veranda and he called us over and when we went across the street the man that

(Testimony of Henry Allen.)

was with me, as soon as we got on the lanai the doctor says, "Good morning, Allen," and I says, "Good morning, Doctor," and he says, "Good morning" to this man and this man took him by the hands and he says, "Good morning, Doctor, Deutchland uber alles."

Q. What did that mean?

A. Well, I don't know. I suppose it means Germany over the Allies, and then the doctor says, "Well, have you heard the news?" and of course this man doesn't come in very often, and he says, "Did you hear the news?" and he says, "Well, I heard the news, but," he says, "There are millions of German reserves in the United States of America—"

Q. Who said that? [144—54]

A. This man that I was with, and the doctor says, "Yes, yes, but I am afraid there is going to be serious trouble," and the other fellow says, "No trouble," and then I turned around to the doctor and I says, "Doctor, is it true that thirty men of the Reichstag representing thirty million men voted for the war?" and the doctor says, "Yes, Allen, they voted for war, but the socialists, even if he is a socialist, a German is a soldier and in a crisis he's got to defend his Fatherland," and I turned around to the doctor and I says, "Doctor, you have sworn allegiance to our flag, is it possible that you will not defend our shores in this war after you swore allegiance to our flag, is it possible you will not defend our shores?" and then he told me, he says, "Well, Allen, I'll tell you. I have sworn allegiance to your flag or country but

(Testimony of Henry Allen.)

I am going to tell you this much, that I didn't swear away my birthright." I says, "You didn't swear away your birthright?" and he says, "No, and this is the crisis where every German whether he is a socialist or not, this is the time that it is up to him to defend the Fatherland." And I walked away and left him.

Q. Have you had any conversation with him since, Captain?

A. No. I believe when I got in trouble he come down to my wagon once and as near as I can recollect when I was in trouble he come down there and said he was glad I got out.

Q. Now, this conversation you have just related occurred between—that is, the doctor made these statements after we had entered the war?

A. That was about the latter end of May, 1917.

Mr. HUBER.—That is all, Captain. [145—55]

Cross-examination of HENRY ALLEN.

Dr. SCHURMANN.—Captain Allen, who was with you on that day in May 1917, when that alleged conversation occurred? A. Peter Halsey.

Q. Did Peter Halsey, whom I do not recollect at all, shake hands with me? A. Yes.

Q. And what did he say?

A. When he shook hands with you, after—when he shook hands, when he shook hands, or as he was shaking hands, rather, with you, he says, "Deutschland uber alles."

Q. He said? A. Yes.

(Testimony of Henry Allen.)

Q. Is Peter Halsey German, or German-American?

A. Well, I should say that,—I'll tell you, he poses as a Dane, but I think he is German himself.

Q. Is this man still in town?

A. I think he is working in Kaneohe.

Q. Did you really hear me say anything derogatory against the United States of America?

A. Well, yes, I should say that would be derogatory to the United States of America, when you swear allegiance to the flag and deliberately tell me that you wouldn't defend our shores, if that isn't derogatory to the United States—

Q. Will you kindly repeat those words again?

A. The words that you—

Q. What statement did I make to you then or am I alleged to have made to you, what statements, what did I say to you? [146—56]

A. What, when I asked you—I told you, I said, "Doctor, you swore allegiance to our flag. Is it possible you will not defend our shores?" and you says, "Allen, I told you before, this is the crisis, and although I am a socialist, remember I am a German and I am a soldier, a soldier and a German, and it is up to him now to defend his Fatherland."

Q. Mr. Allen, how can you make out at all that I am a socialist?

A. Well, now, I am not—I realize in saying you are a socialist that all your work and propaganda as long as I have been with you has been along those lines.

(Testimony of Henry Allen.)

Q. Mr. Allen, do you not accuse me that I stood for Imperial Germany?

A. That you stood for it?

Q. Yes, that I stood for Imperial Germany.

A. Yes, because I told you,—I forgot that in my testimony, you also called President Wilson, you called him a Democrat, and you said President Wilson was nothing more or less than the Emperor of the United States, the way he is carrying on.

Q. Isn't it possible that you made a mistake, that you heard these remarks made by someone else?

A. Well, Doctor, I only got one arm, and I hope it will drop off me and wither on me, on my oath I made no mistake.

Q. Can you bring up on the stand that man who was with you at that time? A. Beg pardon?

Q. Can you bring up here on the stand that man you say was with you at that time?

A. I got nothing to do with that man, it's up to you to bring him here. His name is Peter Halsey, and that's as near as I can get the words he uttered, and he bears around this town [147—57] with every German he shakes hands with, his bearing is that he is in the same boat with you, but he poses as a Dane.

Q. Do you not admit that all the statements excepting one were made prior to the entrance of the United States into the war, do you not admit that all the alleged statements by you were made prior to the entrance of the United States to the war?

A. No, I do not.

(Testimony of Henry Allen.)

Q. Against Germany, excepting one?

A. No, these statements I just made last were made in 1917, in May or about the 1st or 2d of June, 1917.

Q. But all the others you admit were made prior?

A. That's when I lived with you and when you had paralysis and when you got your letters from your brothers in Germany and your people. If you overhaul your memory at the time you had wrote to the President of the United States and you showed me these letters also that same day when you were suffering with paralysis on the lanai, and you showed me his reply from the Secretary of War or Interior, and you were wishing at that time that you could go to Mexico or China.

Q. That's ridiculous, yet, Mr. Allen, mentioning the letter, do you recollect that I used within the letters to the President anything to show that I stood for Imperial Germany or for the expansion of Germany or if I stood for anything else?

A. Well, Doctor, I didn't read the letters. You read them for me, but as near as I can remember, although I didn't take much interest in the letters whatever, but you did read to me your brothers' letters, and your whole makeup at that time was to try and if you will remember I said, "Well, our relations are rather strained now, Doctor, can you get away from here," and you said, "Yes, I can make China or Mexico," and I asked you [148—58] "Are you acquainted in Mexico?" and you said, "Yes, I been in Mexico," and I says, "Where," and

(Testimony of Henry Allen.)

you says, "Santa Cruz," that's the conversation as near as I remember.

Q. I asked you if you did not think that all my utterances were absolutely fair and unbiased in 1914, 1915 and 1916? Didn't my letters show that I stood for all fairness for all the peoples in the war?

A. Your letters, you mean your letter to the President?

Q. Yes.

A. Well, Doctor, really I don't remember the first word that you wrote to the President.

Q. Isn't it peculiar that you can't recall these things but that you recall the other things?

A. No, and I can't recall anything that your brothers wrote to you, Doctor, although you told me but I can't recall it, and although you have offered time out of number on your veranda for to read that book, "The War as Seen Through German Eyes," you read one or two small paragraphs out of it, just a couple of lines, and I left. You never remember reading one chapter of that book to me, and you know at the time that when that book was going out you had knocked the "Advertiser," said the "Advertiser" was rotten to the core, and that the "Star-Bulletin" was the only people that would print anything for you.

Dr. SCHURMANN.—That is all.

Mr. HUBER.—The Government rests.

The COURT.—All right, proceed, Doctor. Have you any evidence to offer? If not, we will argue the case.

Dr. SCHURMANN.—Yes, I have evidence to offer. The first exhibit I want to show is my attitude in this war. We have here an article published in the "Star-Bulletin," on page 3, August 11, [149—59] 1915, and the Secretary of State directs acknowledgment of receipt and replies from the White House, by letter dated October 14, 1914.

(Received in evidence and marked Defendant's Exhibit "A.")

Mr. HUBER.—No objection, he is not under oath, but if the doctor states he is the author of this item the Court can consider it in connection with the other writings.

The COURT.—By offering it he will state that he vouches for it.

Dr. SCHURMANN.—I would also give you as evidence of my loyalty a letter from Washington, the Headquarters of the Red Cross, where it says, dated April 24, 1916, yours of the 6th instant just received. I wish to thank you very much for your generous offer of assistance. However, the enclosed circular will show you the status of our European service. There is no doubt that the use of passive motion, massage, etc., would be a most valuable adjunct to the treatment of injuries in war. I am returning you the clipping which you so kindly sent me. Signed by Major Robert U. Patterson, Medical Corps, U. S. Army, Chief of Bureau. This letter also contains a circular of membership to the Red Cross, which I will offer in evidence.

(Received in evidence and marked Defendant's Exhibit "B.")

Mr. HUBER.—No objection to that.

The COURT.—All right, let it be admitted.

Dr. SCHURMANN.—I have purposely refrained from bringing witnesses on the stand on account of the cross-examination of the papers and their attitude. I don't want to subject my friends to the cross-examination of the papers.

The COURT.—You can take the stand yourself, you are not compelled to, but you may testify if you wish. [150—60]

Dr. SCHURMANN.—Does the Honorable District Attorney sum up the case or will I first get a chance to make a talk on the subject?

The COURT.—Of course, I could not take your statements of the case as evidence, but if you wish to take the stand under oath and testify as a witness you will have to be sworn as a witness, and your testimony will then be considered as evidence, Doctor.

Dr. SCHURMANN.—All right, I will take the stand. [151—61]

Testimony of Frank H. Schurmann, for Respondent.

Direct examination of FRANK H. SCHURMANN, for respondent, sworn.

The COURT.—Now, make whatever statement you may wish to make relative to the question. The question I am concerned with is, what was your attitude or any attitude which you had—well, go ahead and make any statement you wish.

Dr. SCHURMANN.—Well, I wish to state now

(Testimony of Frank H. Schurmann.)
that when I made said oath I meant every word and syllable of it, and do so now, and I have shown by my acts and actions that I have always meant every word and syllable of that oath. My daughters were married from my house with my full sanction to American army officers. My younger son entered the Boy Scouts also with my full sanction. I encouraged him therein and in the Boys' Working Reserve he has earned his Government medal. I have always urged my children to uphold and work for the flag. Those children are American children, born right here in the country. They do not speak a word of the German language, which plainly shows to you that my home and my household was American, not German. I have invested in Liberty Bonds, I have invested in War Savings Stamps, every one of my boys have Thrift Stamps. I myself have offered my services to the United States of America to help and aid, and what more can a man do? I may have made some foolish utterances, especially prior to the entrance of America into this war, why shouldn't I have stood up for the land of my birth when Germany was fighting the European nations, but it was a different thing entirely when America entered the [152—62] war, the land of my adoption. Having renounced fidelity to Germany and sworn allegiance to America I was ready to aid in every respect, and I am ready now, if it comes to the test, to go and help honestly in every respect. What more can a man do, offering free my services, in aid for my country? How can you then think for a moment of taking away my American citizenship which I have been uphold-

(Testimony of Frank H. Schurmann.)

ing all the time? Your witnesses have not shown at all that I have said anything derogatory against the United States of America, they have twisted things a little, and you know it. Who are these witnesses, anyhow, starting with Mr. Holliday, who is a Britisher? The next one is Mrs. Beasely, also a Britisher. The next one is Mrs. Ludwig, they are all Britishers after all. It seems to me that I have been heard before a British court. I am pro-American, and I don't deny that I am not pro-British, and I am not pro-German, I am pro-American. Had I been guilty of sabotage or espionage that would be a different thing, or had I told any soldier, "Why do you fight for this country? It won't do you any good," that would be a different thing, but as related to you before I even helped a young enthusiastic Englishman to go and fight for his country, and that fact is known by the British consul. I financially helped that young man to go out and do his duty. I honor everyone for doing his duty. If you had called on me I would have done my duty nobly for America and the flag although it might have broken my heart in some respects, and why not, do you expect that I should altogether forget the land of my birth? That is not natural, you would not even respect me for that, but as I swore allegiance [153—63] to this flag and as this country became involved in the war with Germany I was and am willing to take up the sword in the defense of this country, of my country, just as much as the northerner took up the sword against the southerner. I believe in the

(Testimony of Frank H. Schurmann.)

principles of Democracy, and I believe in the principles of Justice, as I have shown right from the very commencement, and that was acknowledged by President Wilson by his letter who saw I stood for justice, and as I mentioned before, you will be astonished how close my articles and my thoughts will concur with the peace articles when they are finally signed by the various parties. They are condemned by my father for my thoughts, as far back as 1914, condemned by many Americans and Germans here for taking such an attitude. You bring forth witnesses in order to take away my citizenship. Why, I don't think that when you consider the attitude I have taken, that it is possible to take away these papers from me. Regarding the book, the book was and is propaganda for humanity's sake, to keep the United States out of the war. In former years there was such a beautiful relationship between the Germans and the Americans, and I wish that they had come together and not started any fight, but as the sword was cast in the scale I again must say that I was absolutely ready to stand by the oath I renderd on December the 17th, 1904.

Cross-examination of FRANK H. SCHURMANN.

Mr. HUBER.—Doctor, you say that you believe in the principles [154—64] of Democracy?

A. I do, sir.

Q. And do you believe in the principles of Democracy as exemplified in the Government of the United States? A. Absolutely so.

Q. And as between the Democracy as exemplified

(Testimony of Frank H. Schurmann.)

by the Government of the United States and the Imperialism of Germany as shown by that government, which do you consider the better?

A. The American Government, absolutely so.

Q. Now, Doctor, at page 107 of your book, "The War as Seen Through German Eyes," I will read this (Reading:) "And what is our government, anyhow? Is it a government of the people and by the people for the people? Nothing of the kind. The people sent monster petitions to the President and Congress, march in monster parades and hold monster mass meetings, requesting embargo on ammunition, but not the slightest attention is paid to all this by His Majesty President Woodrow Wilson, who acts as though he were the autocratic ruler of the U. S. A., and not like what he really is, the first servant of a sovereign people. Of what use are petitions and demonstrations? We might as well petition a fence post."

And I will read from page 40 of your book, Doctor, Prussianism: (Reading:) "It is not amiss right here to explain to you what Prussianism really is. Prussianism is efficiency and justice. It is honest, sincere, earnest, loyal, stern, organic. It is the highest and noblest condition that exists in the world today. True, Prussianism is oligarchic and aristocratic, but why should not the wise and able rule, rather than the foolish and inefficient? Is not the money power an oligarchy also? Does it not rule our democracies [155—65] in spite of our suffrage? Prussianism is a Christian aristocracy, a

(Testimony of Frank H. Schurmann.)

Spartanism. Prussia inherited the Spartan spirit from the Order of the Teutonic Knights, and the Prussian princes became Grand Masters of the order. Thus Junkertum is the backbone of Deutschtum. Prussianism has been a great blessing to the German nation by making it wonderfully efficient and united. The Germans are fighting valiantly to conserve their government and their brand of civilization. It would be well for us if we would examine Anglo-Saxonism and Americanism. Perhaps we might see their close relation to Mammonism. What has become of the American spirit of fair play? Has the Almighty Dollar broken the sword of Justice and bound the feet of Liberty with chains of gold?"

Q. Do you mean to tell this Court that when you penned these lines you considered the democracy of America superior to autocracy of Prussia?

A. Most decidedly. When I pointed out to you some time ago that the title of that book is the War as Seen Through German Eyes, that is not through my eyes. Those were the copies of paragraphs and newspaper articles and extracts from American magazines which pointed out those things, and furthermore the book being intended as a propaganda to keep the United States out of the war, things, of course were exaggerated, as, of course, all propaganda are. Every force was used therein to keep the United States from entering that war, and at that time I was absolutely entitled to do so.

Q. Doctor, in the preface of your book you say: (Reading:) "Knowing that the plain facts herein set

(Testimony of Frank H. Schurmann.)

forth will open the eyes of many who have been deluded by the press, the author is convinced that much good will result from this book. It gives [156—66] the thinking public an opportunity to form a sane judgment regarding the Right and the Wrong of the warring nations and regarding the Unreasonable Attitude of the United States of America toward the Teutons and hyphenated German-American citizens. After a brief space of but two months from the compilation of this little volume, a call for a second edition comes from an appreciative public, and I most gladly respond. This new edition is revised and somewhat enlarged, but remains what I meant it to be, "a brief and sincere expression of my feelings and opinions, together with indisputable facts regarding the great international struggle now going on in Europe."

A. Yes, no doubt there was some feelings of mine expressed within that book, but very few, indeed. The principal feeling was that to keep the United States out of the war. When you read another paragraph that I wrote wherein I stood for the election of Mr. Hughes, because a change of government, I thought, would keep the United States out of the war, it shows it was simply meant as propaganda, to keep the United States from fighting.

Mr. HUBER.—That is all, Doctor.

The COURT.—Doctor, do you wish to offer any other evidence?

Dr. SCHURMANN.—I do not.

Mr. HUBER.—I don't care whether we offer any

argument or not, but I presume the doctor wants to argue.

The COURT.—Doctor, do you care to argue in addition to the testimony you have given?

Dr. SCHURMANN.—Yes.

The COURT.—All right. We will continue this case, then, until to-morrow morning at ten o'clock. [157—67]

In the United States District Court, in and for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Respondent.

Honolulu, H. T., January 7, 1919.

Mr. McBRIDE.—If the Court, please, I wish at this time to enter my appearance as counsel for the defendant, and likewise move the Court at this time for a continuance until Monday next, at the usual court hour. Prior to this motion, and entering my appearance, I have consulted with the United States District Attorney who states that he has no objection to the motion. Of course, if the Court please, it is well known to counsel and to your Honor, that the defendant in this case has, at his own request, had sundry and divers continuances, but becoming apprehensive of further representing, he has asked me to act as his counsel in the case. I appreciate further-

more, your Honor, that when counsel appears in the middle of a case or during the trial that he must take the case as he finds it, and I wish to urge upon the Court, in the first place, if there is any doubt granting the motion that this is an equity case, and being an equity case, some liberality should be shown in the argument of a motion of this kind. This defendant was admitted to citizenship in [158—68] 1904, and different from some other cases no harm can possibly come to the United States in granting a reasonably short continuance simply for the purpose of counsel now in the case refreshing his memory as to the previous proceedings. If your Honor feels that Monday is too long a time, then any other time fixed by the Court will be agreeable.

The COURT.—I am always disposed to give every litigant every opportunity to secure counsel, but the manner in which this presents itself now is, the defendant had every opportunity in the world to procure counsel and has neglected to do so, and now the case has come to trial, himself announcing that he is ready as well as the Government, and the evidence is closed, and the Government has waived opening argument, and the matter was postponed until this morning for the purpose of allowing him to argue it. Of course, if you want to argue it for him, that is all right, you can do so, if you wish, but in view of the many continuances and postponements that have been granted in this case, and in view also of the fact that the evidence has closed, I am going to refuse your motion, and you can proceed with the argument.

Mr. McBRIDE.—Will your Honor grant counsel for the defendant a reasonable time to prepare a written motion properly supported for the purposes of the record, and I might state to your Honor that that suggestion is made for this reason, that the continuances granted at the request of the defendant were not made captiously, but for the purpose of securing counsel, and in a general way, the situation is this, your Honor, that Doctor Schurmann has walked all over this town and has consulted sundry and divers lawyers, many of whom for patriotic reasons refused to act at all, while others demanded exorbitant [159—69] fees away out of sight for the services to be performed, yet this is the situation, your Honor, as I say, this is an equity case, and I don't think there is any desire on the part of the United States Government to take advantage of the defendant. He finds himself in a pecuilar position, and is not schooled in the ways of the law, and I think this being a case of first impression in this Territory, I don't think there is any desire on your Honor's part to decide this case in a hurry.

The COURT.—The case isn't going to be decided in a hurry, and I am always entirely disposed to granting a reasonable request in such matters, in all cases. This case was filed when, Mr. Clerk?

The CLERK.—August 27, 1918.

The COURT.—August 27th, 1918. It is an equity case, and does not require a jury, and the statute requires sixty days before it could go to trial; in other words, I repeat that the defendant has had ample op-

portunity to employ counsel, and if he had asked for a further postponement, because he could not employ counsel, before this case was begun, I think I would have given him more time for the purpose of employing counsel on that kind of a showing, but he has announced himself ready and has pretty well defended himself about as well as a man can without a lawyer, he has taken care of his interests fairly well, and he has not lost any of his rights by reason of being without a lawyer, and as a matter of fact the Court has made certain suggestions to him on account of the fact that he was without an attorney that the Court would not have made, but for the fact that he was without an attorney. The Court wants to give him his legal rights, but at the same [160—70] time the Court does not want to be played with, after the evidence is all in to ask for a postponement for a week or any other time.

Mr. McBRIDE.—Will your Honor grant a continuance until to-morrow morning at ten o'clock?

The COURT.—I will grant you a continuance for thirty minutes. The Court will be at recess for thirty minutes.

AFTER RECESS.

Mr. McBRIDE.—If the Court please, the defendant at this time desires to file a written motion for a continuance, which in words and figures, entitled court and cause, is as follows: (Reads.) Argues motion.

The COURT.—The motion to continue the case is overruled. I realize that you have the right, or I

accord you the right although he closed his case, to reopen the case. We will reconvene at two o'clock and I will permit further testimony to go on. [161—71]

In the United States District Court, in and for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Respondent.

Honolulu, H. T., January 7, 1919, 2:00 P. M.

Mr. McBRIDE.—From a short examination of the record, I honestly believe, if the Court please, that there has been a vital and serious failure of proof on behalf of the United States, the plaintiff in this proceeding, in that thus far no evidence has been adduced on the part of the United States of America showing or in any manner tending to show that the defendant in this proceeding took any oath in the Los Angeles court, and if he did take an oath the nature thereof, as alleged in the various allegations of the complaint.

Mr. BANKS.—That is admitted by the answer.

Mr. McBRIDE.—I at this time ask leave on behalf of the defendant to withdraw the purported appearance and answer filed by the defendant and dated October 25, 1918, and file in lieu thereof—

The COURT.—I refuse to permit it to be withdrawn.

Mr. McBRIDE.— —and to file in lieu thereof a new answer to be filed within one hour of this time. [162—72]

Mr. HUBER.—The plaintiff objects to that, your Honor.

The COURT.—I refuse to allow that, because the Government has proceeded all along up to now upon the faith of that answer and it would be treating the Government wrong. He admits it is true.

Mr. McBRIDE.—At this time I move on behalf of the defendant that all of the evidence in this case of the witnesses Holliday, Beasley, Ludwig and Allen, be stricken. Secondly, I move—secondly, if the Court please, that the bill of equity was based upon the affidavit of one Jannette Ryan nee Mrs. John W. Ryan, whereas said witness was not called by the plaintiff in this case, and upon the additional grounds, if the Court please that there was no foundation for the introduction of any of the evidence or any of the witnesses adduced by the prosecution for the reason that this being an action founded upon fraud the circumstances of the fraud must have been first set forth in the bill of complaint to entitle proof thereof.

The COURT.—Overrule the motion.

Mr. McBRIDE.—We have two witnesses here, the Misses Hitchcock. I am informed that their father is in a very precarious condition, liable to die at any moment, and for that reason, your Honor, I would

(Testimony of Martha B. Hitchcock.)

like to call them at this time and let them be released.

The COURT.—All right; call them first. [163—73]

Testimony of Martha B. Hitchcock, for Respondent.

Direct examination of MARTHA B. HITCHCOCK, for respondent, sworn.

Mr. McBRIDE.—State your name, please. What is your name?

A. Martha B. Hitchcock.

Q. What is your father's name?

A. Charles Henry Hitchcock.

Q. What is his business or occupation, or profession?

A. He was for forty years professor of geology in Dartmore College, now retired.

Q. What nationality is your father?

A. American.

Q. Born where, please?

A. Amherst, Massachusetts.

Q. And your mother?

A. My mother is also American, and she was born in Ohio, in Hudson.

Q. And what is you own nationality?

A. I am an American, I was born in New Hampshire.

Q. You know Doctor Frank H. Schurmann, the defendant in this matter? A. Yes, I know him.

Q. How long have you known him?

A. I cannot give you the exact date, but I think it was in 1912 that I first met him as a patient. It

(Testimony of Martha B. Hitchcock.)

was either in 1912 or possibly 1913. If I had my diary here I could tell you exactly.

Q. Have you had occasion since the first time you became a patient of the defendant, to see him and talk with him and consult with him on many occasions?

A. Yes, sir, I have been under his care quite a little.

Q. As a matter of fact he has been your house physician for many years? [164—74]

A. Several years, yes.

Q. And during that period of time have you had occasion to discuss with Doctor Schurmann the United States of America or its aims or purposes, or anything of that kind?

A. We talked—I don't know exactly what you mean, but we talked about the United States, and in—well, I don't quite know what you mean.

Q. You say you had talks with the doctor concerning the United States. What has been the general nature of these talks, what did you say and what did the doctor say?

A. Oh, it has been chiefly in connection with the war.

Q. Just tell us about that please, Miss Hitchcock.

A. Well, our first talks about the war, I don't know whether you want me to tell about that or not.

The COURT.—Miss Hitchcock, anything that he said to you, whether about the war or not, anything that he said to you at any time that might throw light on the question as to his own loyalty to the United

(Testimony of Martha B. Hitchcock.)

States. I suppose that is what you want?

Mr. McBRIDE.—Yes, your Honor.

A. Yes, I heard him. I can tell you, and I can give you the date, too, pretty nearly. I was having an illness in 1917, I think perhaps April or May, it was just after the United States was at war, and Doctor Schurmann came to our house to treat me. We were speaking of the fact that he had been a German, and now a citizen of the United States. I remember saying to him that before the war,—well, it was like walking on two sides of a narrow stream. Before the war began he could be interested in Germany on one side, and in the United States on the other side, but now that the United [165—75] States and Germany were at war it was as if the stream was so wide that he couldn't walk on both sides, and I recall that he said, "Certainly that is so, and I am walking on the American shore."

Q. Now, will you be kind enough to give us other conversations you had with the doctor, either before war was declared by the United States upon Germany or thereafter, concerning his attitude, anything that would elucidate that situation to the Court?

A. Well, before the war was declared, when it seemed to be chiefly between Germany and England and we talked on the subject of the war, his sympathies seemed to be with Germany.

Q. That was prior to the entry of the United States into the war?

A. Prior to the entry of the United States. Since the entry of the United States I cannot remember his

(Testimony of Martha B. Hitchcock.)

ever even once,—I don't recollect his ever speaking in favor of Germany contrary to the United States.

Q. Miss Hitchcock? A. Yes?

Q. War was declared on the 6th day of April, 1917, by the United States upon the Empire of Germany.

A. Yes?

Q. Now how many times subsequent to the 6th day of April, 1917, have you had occasion to see and talk with the defendant in this case, I mean approximately, once a week, twice a week?

A. I can't tell you exactly, but I think about once a week.

Q. As a matter of fact during these occasions as various items would appear in the newspapers concerning the war, you discussed the matter, did you not, in a general way?

A. Well, we talked in a general way, and still a great many times we never spoke on the subject at all.

Q. But as a matter of fact ever since the 6th day of April last [166—76] year you have not heard Doctor Schurmann say anything contrary or in derogation to the United States?

Mr. HUBER.—Object to that as leading.

The COURT.—I think the witness has answered already that she has not since the United States entered the war heard Doctor Schurmann say anything.

A. I heard him say nothing that was disloyal to the United States, I heard him say nothing that was

(Testimony of Martha B. Hitchcock.)
against the United States Government.

Mr. McBRIDE.—Take the witness.

Cross-examination of MARTHA B. HITCHCOCK.

Mr. HUBER.—You mean nothing in your judgment that was against the United States Government, Miss Hitchcock?

A. Of course I have to use my own judgment.

Q. And Miss Hitchcock, you are the Martha B. Hitchcock who wrote this letter commendatory of "The War as Seen Through German Eyes," on August 12, 1916?

A. I wrote a letter—I don't know exactly how it is printed, it is not printed as I wrote it. I wrote it at a time that I myself was absolutely as near as I could be, neutral, and I intended my letter to sound neutral. I was not at all sure that I was in sympathy with Germany or with the Allies because I had before been a pacifist and I did not intend my letter to sound either for one side or the other. It is not printed as I wrote it, just a few words may have changed the meaning of it. [167—77]

Mr. HUBER.—I would like to have you read that letter now and say whether that expresses the sentiments you then felt.

Mr. McBRIDE.—I think there are apt to be changes in a printed letter and as originally written.

A. I think I can explain it best.

The COURT.—He wants you to read the letter and state whether or not those are your sentiments.

A. My sentiment was, having read a great deal of literature in favor of the Allies I thought it time, or

(Testimony of Martha B. Hitchcock.)

fair at least, to read something in favor of Germany, in favor of the German side, and for that reason I was willing to read the book. The changes I speak of are mostly in the dictation, using certain words that I never used. I don't think the sentiment was changed.

The COURT.—Well, the District Attorney asked you to read the letter, Miss Hitchcock.

Mr. HUBER.—Yes.

A. (Reading:) Honolulu, T. H., August 12, 1916. We must face squarely the problem before us, the horrible war, not horrible, that was put in, its real cause and the prevention of similar happenings. In order to do this every viewpoint should be studied. I have read lots of literature viewing the war through British eyes, now comes your book, seeing the war through German eyes. In a community whose sympathies are mainly with the Allies such a work is very much needed. I am not sure but that I simply said, such a work is needed. Your essay will be thoughtfully read by everyone who wishes to hear both sides in order to judge fairly. I think that expresses my sentiment that I held at that time.

Q. You had read the book prior to writing that endorsement, had [168—78] you Miss Hitchcock?

A. Well, I have not read it carefully, I read it from a literary standpoint. I was studying writing and English, and he asked me to criticize the book from the standpoint of the writing and grammar, not the grammar but the expressions, and I read it with that in mind. At this time when I wrote this I

(Testimony of Martha B. Hitchcock.)
had not then decided in my own mind the right and the wrong, but I have very much decided since then. At that time I was neutral.

Q. You say at that time you were neutral, Miss Hitchcock? A. Yes.

Q. That is, as between Great Britain and her Allies, and the Central Powers?

A. Yes, President Wilson requested us to be neutral as we could, and I tried to follow his opinion.

Q. Now, did you feel any decided sympathy one way or the other at that time?

A. Well, I could not stay neutral very long because of the atrocities I read of.

Mr. McBRIDE.—Which way did you switch, towards Great Britain and her Allies, and against the Central Powers and their Allies, which way did the scales go?

A. I was decidedly in sympathy with the Allies and their cause. At the beginning it appeared to me as simply a scrap between two illnatured dogs who had intended to fight with each other for years and now had the opportunity, that's the way it looked at first. When the news of the atrocities came I did not believe it at first.

The COURT.—Did you understand that to be neutral you should not sympathize with either side? [169—79] A. Well, I thought—

Q. Did you understand, being neutral, that you had to refrain from sympathizing with either side, or wishing either side success, that in order to be neutral you had to refrain from wishing either side success,

(Testimony of Martha B. Hitchcock.)

did you understand that to be neutral you had to be—you had to have no sympathies whatever in regard to it, understand the question? A. Yes.

Q. Did you understand to be neutral that you had to have no sympathies whatever with either side, have no wishes toward the success of either side, did you you understand that, to be neutral?

A. I am trying to think just how I did feel about it because I changed so afterwards. I understood neutrality to be perhaps not taking either side whatever one might feel in one's heart, impartial, perhaps. I tried to follow President Wilson's advice.

Q. You were not only neutral but impartial, non-sympathetic, toward either side, I am just trying to get your attitude from the testimony.

A. I thought it was my duty to not take either side, I don't know of any other way of putting it, but at heart I could not keep that up very long. Just as soon as I got a little bit informed, my sympathies went all with the Allies, because I felt theirs was the right cause.

Mr. HUBER.—You said something occurred in a conversation between you and the doctor soon after our entry into the war in which you spoke of one who had been a German citizen and had become a citizen of the United States, walking along a narrow stream in which they could walk on both sides but the war widened the [170—80] stream. Did I understand that you yourself used that expression or illustration and that the doctor then agreed with it or did he use that illustration?

(Testimony of Martha B. Hitchcock.)

A. Well, I am not certain, but I think that I suggested it first, though I am not sure whether I suggested it and he said, "Well that expresses it exactly," and whether he said it and I said, "That expresses it exactly," I am not certain. The thing that impressed me was that he said he could not walk on both sides, that he was now walking entirely on the American side, is what I remember especially.

Q. You said both of your parents were born in America, of what extraction is your father?

A. My father and mother are of British extraction, Pilgrims. As far as we are able to find out from their genealogy all our ancestors came from American Colonies. As far as I know I have no ancestors of any nationality but American as long as there was an America. My ancestors as far as I am able to find out were in America as early as 1640.

Mr. HUBER.—That is all.

Redirect Examination of MARTHA B. HITCHCOCK.

Mr. McBRIDE.—I understand you to say in fact that your idea in endorsing a work of this sort was simply for the purpose of educating the people generally to both sides of the controversy then existing, that they should have all the alleged facts before them?

A. Yes, I did not feel very strongly about it, in fact I did not [171—81] feel very strongly about it, but because the doctor wrote the book and asked me to criticize it, he expressly said, I remember, not the matter but the form in which it was written. I

(Testimony of Martha B. Hitchcock.)

was studying the writing of English, and it did seem to me that we had so much pro-Ally literature that it seemed only fair that we should read something on the other side. We were not at war, and so when the book came out written on the other side it seemed to me the right thing. We were not obliged to read it, it was fair and we were not in the fight then and it was fair to hear both sides. Perhaps I might say I was rather hoping I would find some way of explaining the German atrocities.

Q. You did not want to believe that such horrible things were true?

A. Yes, and hoping that I would find that in support, and I hadn't the heart to believe it. I had friends in the East of German extraction and knew it was utterly impossible for them to do such things.

Q. But on the declaration of war between Germany and the United States, on April 6, 1917, you did not remain neutral?

A. No, I gave up being neutral long before that. I think the "Lusitania" did it.

Mr. McBRIDE.—That is all. [172—82]

Testimony of Alleine L. Hitchcock, for Respondent.

Direct examination of ALLEINE L. HITCHCOCK, for respondent, sworn.

Mr. McBRIDE.—State your name.

A. Alleine Lee Hitchcock.

Q. You are a sister of the witness who has just testified? A. I am.

Q. As you were walking to the stand you men-

(Testimony of Alleine L. Hitchcock.)

tioned to me that she inadvertently made a misstatement or something.

A. What I meant was, you asked her over again what is the story and she spoke of a river, walking at the beginning of the war along a narrow river, you remember the illustration? When she repeated it she said the doctor said now he was walking on the German side, and I know she meant to say the American side.

Q. I did not notice that. However, that part of her evidence, the evidence of your sister as to the ancestry of your father and mother and yourself et cetera, that is all true, is it not? A. Yes.

Q. You are a good American?

A. I am proud to say so.

Q. A good American of Puritan stock?

A. I cannot see how I could be much more loyal.

Q. I assume that you have known Doctor Schurmann, the defendant, for some years?

A. Yes, a similar length of time.

Q. And have had occasion to consult him professionally and talk with him personally on many occasions the last number of years? A. Yes.

Q. Now prior to the declaration of war on the part of Germany or [173—83] thereafter, have you since had occasion to talk with Doctor Schurmann or discuss with him the war with Germany or matters of that sort?

A. Very little, but we have spoken of it occasionally.

Q. Now, just try and remember, if you please,

(Testimony of Alleine L. Hitchcock.)

what conversation you had prior with the doctor concerning the matter, prior to the declaration of war by America and Germany.

A. I think whatever we said was mostly general, deploring the general horror of the war. We did not say anything very special. I knew he came from Germany and did not care to talk about it because I knew his family was all there and naturally he would feel badly about them all being in the war. We said very little prior to the beginning of the war.

Q. Then I will ask you after April 6th of the year 1917, to state to the Court any remarks made by you, —any remarks made to you by the defendant in this case showing or tending to show his loyalty or otherwise towards the United States.

A. I took the trouble to write down some of the things he said, and perhaps it would be better for me to read it.

Mr. McBRIDE.—You may read from that; I think there is no objection.

Mr. HUBER.—If it is for the purpose of refreshing her recollection and if the statements were written at the time.

A. I can remember very well, I think, it is not necessary. I thought perhaps you wanted it exact. I had avoided talking about the war very carefully because it was not a pleasant subject, but there came a day when I felt as though I must know how he felt, because he was our family physician, so I made it my business to talk to him and when I came home I wrote down some of the things he said because I re-

(Testimony of Alleine L. Hitchcock.)

alized some day they might be important. [174—84]

Q. Right there, Miss Hitchcock, what date was that, as near as you can remember?

A. It was the first week in August, I think, last year.

Q. Of last year?

A. Yes, when the war was well going.

The COURT.—1917?

A. I mean 1918, yes.

Mr. McBRIDE.—You say you want to be sure and get everything exact. Did you make that memoranda at that time on that paper?

A. Not that day, but very soon after.

Q. You may then look at the paper and refresh your recollection as to what was said.

A. This is some of the things he said: (Reading:) "Germany has been wrong from the very first. I do not stand for any atrocities or for the killing of citizens or for the mistreatment of women. There can no longer be any middle ground. I am an American citizen most decidedly. How can anyone help being on that side who is human and kindly? I hope some time to get into the service in this war, not on the German side, but on the American side." He said other things similar which I did not write down, all in that same line.

Q. All in the same vein?

A. Yes, and he seemed to feel badly that I should doubt him at all, because he knew of the loyalty of our family, and he said, "How do you think I could come up and take care of your family if I were dis-

(Testimony of Alleine L. Hitchcock.)

loyal?" and other things in the same line, but these are what I wrote down. Since then I have not—

Q. You were satisfied and did not care to pursue the matter any further, is that it? A. Yes.

Mr. McBRIDE.—You may cross-examine, Mr. Huber. [175—85]

Cross-examination of ALLEINE L. HITCHCOCK.

Mr. HUBER.—What was the date in August that you say this conversation was had?

A. It was about the 6th, but before the prosecution had been taken up against him. I have the impression that very night something came out in the paper, the starting point, but our conversation occurred before there was any prosecution whatever, simply now and then in the papers there had been reference some time or other.

Q. You had seen those references in the papers?

A. No, there had been nothing, and I think it was that very night that it came out and I was very glad that I had the conversation previously.

Q. And this was the only conversation of the kind that you had with the doctor?

Mr. McBRIDE.—I object, he is trying to mislead the witness.

The COURT.—Go ahead, this is cross-examination.

Mr. HUBER.—Miss Hitchcock, I believe you stated at the outset that you had previously avoided discussing the war with Doctor Schurmann?

A. Yes, I did at the beginning.

Q. And you continued to avoid such discussion

(Testimony of Alleine L. Hitchcock.)

until this date, about August 6, 1918, is that correct?

A. Yes, I do not recollect discussing it—yes, that is correct.

Q. Now, you say at this time you felt satisfied?

A. Yes, I did.

Q. Now, did you have any conversation with the doctor afterwards [176—86] along this same line?

A. We spoke on the subject occasionally with more freedom, feeling that he sympathized with us. We had no discussion; I never asked him again, never talked about it that way again.

Mr. HUBER.—That is all.

Mr. McBRIDE.—Never doubted him again, that's the fact, isn't it? A. Yes.

Mr. McBRIDE.—That is all. [177—87]

Testimony of Frank H. Schurmann, for Respondent. (Recalled.)

Direct examination of FRANK H. SCHURMANN, for respondent, recalled.

Mr. McBRIDE.—Doctor Schurmann, where were you born?

A. In Essen, Germany.

Q. That was made part some years ago of Prussia, was it not? A. It was.

Q. And up to the late disintegration of the German Empire was part of Prussia? A. It was.

Q. How long did you, or what age did you attain before you left Germany, Doctor?

A. About twenty years of age.

(Testimony of Frank H. Schurmann.)

Q. And you left Germany, I understand you to say? A. Yes, sir.

Q. To what place did you go?

A. To the United States of America.

Q. At what port, where did you land?

A. San Francisco.

Q. Why, Doctor, did you leave Germany at that time?

A. Because I had come in contact with people who had lived in the United States, and by having come in contact with them I became imbued with that feeling of freedom.

Q. Well, didn't you have some spirit of freedom in Prussia, the same feeling of freedom in Prussia that you were informed existed in the United States?

A. Oh, no, there was a different feeling altogether. We had there, for instance, conscription and great restrictions in many ways. [178—88]

Q. Tell us some of those restrictions.

A. Officialdom made itself very much felt all over the country.

Q. In what way?

A. I recollect a case, when as a boy, going to the postoffice and whistling through the little window where the man who gives out the letters was standing. He objected to that strenuously, and thereupon laid a complaint with the school authorities in order to summon me on a charge of disrespect to the uniform of His Imperial Majesty, and other things of that kind which equally jarred on my nerves showing personal autocracy.

(Testimony of Frank H. Schurmann.)

Q. Have you at any time, Doctor, been in accord with the ideas of Prussian autocracy as we all understand it, I mean, do you sympathize with the ideas of Prussian autocracy?

A. I expressed that yesterday, that I do not sympathize with them.

Q. As between, Doctor, if you please, the principles of Prussian autocracy and the democracy of the United States, to which do you incline, to the American form of government with its principles and its constitution?

A. Absolutely so, which was stated yesterday.

Q. I understand you to say that was your prime reason for leaving Germany at that time?

A. It was.

Q. State whether or not, Doctor, to your knowledge, information or belief, any other persons besides yourself left Germany, the Empire of Germany, at that time for the same reason?

Mr. HUBER.—Object to it as immaterial.

The COURT.—Yes.

Mr. McBRIDE.—Now, you say you arrived in San Francisco at the age of about twenty years—you were twenty years of age when you [179—89] reached San Francisco?

A. No, somewhat later, because I made a stay in Australia.

Q. You stayed in Australia a little while and then you went to San Francisco. What did you do in San Francisco, Doctor?

A. Nothing at all; I took in the sights.

(Testimony of Frank H. Schurmann.)

Q. And from there where did you go, from San Francisco? A. Thence to Chicago.

Q. What did you do in Chicago?

A. I entered the National Medical University, and thence the Union College of Osteopathy at Cleveland, Ohio.

Q. And from there were did you go?

A. I went back to Chicago and took a course in the Northern Illinois College of Opthalmology and Otology, and thence became a professor in the Chicago Golden Cross Eye, Ear and Nose Clinic. Later I went to Los Angeles and occupied the Chair of Optometry in the Pacific School of Osteopathy.

Q. Then what, after that?

A. I went then in the optical business and established myself later in San Luis Obispo, where I practiced Osteopathy.

Q. Yes, the memorandum which you furnished me about this says something about a cross, not an Iron Cross?

A. No, that was in relation to the professorship in that Clinic.

Q. That is the medal herein referred to?

A. No reference to a medal at all; it was simply a medal from the Eye, Ear, Nose and Throat Clinic.

Q. Pardon me if I ask this question, but I think it is necessary. You have been married twice, have you not? A. Yes.

Q. Where were you married the first time, Doctor?

A. In Australia. [180—90]

Q. Of what nationality or descent was your wife?

(Testimony of Frank H. Schurmann.)

A. Irish.

Q. Not German? A. Not German; no.

Q. Did you have any children by her?

A. Yes, sir.

Q. How many? A. Four.

Q. And then you were married later on to your present wife? A. Yes, in California.

Q. Of what nationality, Doctor, please, is your second wife? A. She is American.

Q. Of what descent?

A. Of German descent, though her parents were American, born in America.

Q. She was born in America?

A. Yes, and so were her parents.

Q. Since you married her has she been back to Germany? A. No.

Q. Did you know her in Germany before you came to the United States? A. No.

Q. And her parents were born in America?

A. Yes, sir.

Q. Now, Doctor, I was not present here yesterday, but I understand that a man named Holliday called on behalf of the United States in this proceeding claimed that he had had certain discussions with you in March, or from March 1st, 1917, about the war.

A. Yes, sir.

Q. And who claimed that you had a picture of the Kaiser before the war in your possession and hanging up in your office? [181—91]

A. Not in the office, but in his rooms, in his quarters.

(Testimony of Frank H. Schurmann.)

Q. State whether or not, Doctor, you had pictures of other personages in any of the rooms there?

A. Why, yes, I had a picture of our president, President Wilson, and of Roosevelt.

Q. And who else?

A. Of Washington, Lord Nelson, and of many historic characters.

Q. Yes, now something has been said in evidence concerning a medal it is claimed you wore before the war? A. I did.

Q. Tell us about that, please.

A. I admit that I wrote for some Irish magazines or papers.

Q. Along what lines, what was the theory or theme?

A. They were practically extracts of the book on the lines of the war.

Q. For what cause, championing what idea?

A. The freedom of Ireland, and as I champion the freedom of small nations.

Q. State whether or not you know whom the persons were who sent you the medal in question.

A. I haven't the slightest idea.

Q. You did not receive any letter concerning its transmission or anything of that kind?

A. No letter or no note.

Q. The witness Holliday testified that you made certain derogatory statements to him concerning the United States of America. I will now ask you, Doctor, categorically, whether you made to the witness Holliday or to anybody else at the time he says,

(Testimony of Frank H. Schurmann.)

or at any other time, any derogatory statements concerning the United States of America? [182—92]

A. That I absolutely deny.

Q. Now tell us something about this man Holliday, who was he or who is he?

A. He came to me as a stranger.

Q. Yes.

A. And he went to room in Mrs. Schurmann's rooming-house.

Q. What was his business?

A. I believe he was an accountant at that time, he was out of work and rather hard up. I befriended him in many ways and helped Mrs. Holliday in getting a position as a nurse as she was very smart, though not a certified nurse, and I sent her to the Hitchcock's where she did very well as a nurse. Later on through my influence she got into a local hospital, having had the experience with that local family.

Q. Does any reason now, or does it occur to you why the witness Holliday should make under oath on the witness-stand untruths as you say they are? Have you had any trouble with him?

A. I can't account for anything at all.

Q. When these matters were being,—the matter of whether or not you were loyal or otherwise towards the United States of America was being agitated in the public press, Mr. Huber requested you to send to him your certificate of citizenship or something of that kind, did he not? A. Yes, he did.

Q. And did you furnish that?

(Testimony of Frank H. Schurmann.)

A. That was prior to the time the question was raised. I did not know what it was leading up to.

Q. And you immediately sent it to him?

A. Most decidedly.

Mr. McBRIDE.—And Mr. Huber, will you be willing to produce *the* [183—93] *doctor* wrote to you offering to surrender these books, or shall I prove that?

Mr. HUBER.—Yes, I think I have it.

Mr. McBRIDE.—You wrote Mr. Huber, the United States Attorney, a letter, offering to turn over to him certain copies of this publication here, "The War as Seen Through German Eyes"?

A. Yes, from loyal motives.

Q. Now, was that letter you wrote to the United States Attorney in response to any letter you received from him or was it a voluntary act on your part, writing that letter offering to turn the books over?

A. It was a voluntary act, whereupon Mr. Huber wrote me a letter declining to send for the books, as it was not necessary.

Q. Have you that letter with you?

A. I have it at home, not with me.

Mr. McBRIDE.—I ask leave as part of the evidence of the defendant that we proceed to offer the letter later.

Mr. HUBER.—I have a copy of the letter.

Mr. McBRIDE.—Now, we will pass to the witness Beaseley, is that a man or a woman?

A. Woman.

Q. Who is this Mrs. Beaseley?

(Testimony of Frank H. Schurmann.)

A. Mrs. Beaseley is an old English lady who was in need of employment, who I employed in my establishment.

Q. In what capacity? A. As housekeeper.

Q. How long was she in your employ as such housekeeper? A. She was with me for two months.

Q. That is September and October, 1917?

A. Yes.

Q. Had you any knowledge at that time, during the months of [184—94] September and October, 1917, as to her financial condition, Doctor?

A. She was always hard up.

Q. And you heard her statement here yesterday to the effect that she asked you whether you were buying Liberty Bonds or something of that kind, what was that?

A. Well, she made the statement here that she remarked to me that she intended to buy Liberty Bonds. Of course, I deny such a fact absolutely because the woman was never in condition, you see, never had any intention to do so.

Q. That is, she never had the money?

A. Never had the cash.

Q. Now, Doctor, state whether or not after the declaration of war by the United States of America upon the Empire of Germany you yourself bought any Liberty Bonds? A. I did.

Q. Did you buy any War Savings Stamps and Thrift Stamps? A. Yes, sure.

Q. How many children have you now, Doctor, living? A. I have eight children living.

(Testimony of Frank H. Schurmann.)

Q. Married or single?

A. Three are married and the rest are single; then there is the little baby, being two weeks old or a little less.

Q. Now, those who are married, what are they, male or female? A. Female.

Q. And to whom are they married?

A. Two of them are married to American army officers.

Q. Doctor, prior to the marriage of these two daughters to American Army officers, state whether or not your daughters consulted you about getting married to the army officers, or asked your permission and consent to the marriage? [185—95]

A. Yes.

Q. Did you give your consent? A. I did.

Q. How about the others, who did they marry?

A. There is only one more daughter, living in Los Angeles.

Q. And who did she marry?

A. She married a man who offered his services to the country but was rejected on account of his age.

Q. What nationality is that man?

A. That man is American, of Irish descent.

Q. I understand that the record here shows that you yourself tendered your services to the Red Cross of the United States? A. I did.

Q. Now, how about your children, did they buy any War Savings Stamps? A. Yes.

Q. You explained something to me this morning about—in consultation this morning, about the activ-

(Testimony of Frank H. Schurmann.)

ities of your children in buying Thrift Stamps and joining the Boy Scouts, what was that?

A. I mentioned to you the activities of my little boy, a boy about fourteen years of age, who has been an active Boy Scout now for several years. He has earned for himself the medal of merit for working in the reserve force in Kauai. He spent his vacation there doing hard work for the Government, encouraged by me. He has also been selling Thrift Stamps, thereby attaining a sergeantship, I believe now a second lieutenantship.

Q. Now, let us go back a moment to the late lamented Kaiser of the former German Empire; state whether or not after the 6th day of April, 1917, you continued to have about or exhibited in your rooms or premises, office or domicile, any picture of the Kaiser? A. Not after that date. [186—96]

Q. Why did you take it down, Doctor?

A. Because my attention was drawn to it by Mr. Holliday, and because my feelings were such when America entered the war that I should take the picture away.

Q. And you did? A. Yes.

Q. What did you do with George Washington and Abraham Lincoln and Lord Nelson?

A. They are still hanging in both offices at home.

Q. Have you ever been back to the Empire of Germany since you were naturalized in 1904 in Los Angeles? A. No, sir.

Q. Do you ever intend to go back, any intention of going back?

(Testimony of Frank H. Schurmann.)

A. Not at present, no. If the country of Germany could be modelled after the constitution of the United States of America I may go there on a visit.

Q. Then it might be a fit and decent place to live in, in the words of our President, you think?

A. Exactly.

Q. Let us pass on now to the witness,—I will ask you one question there. Did you ever in your lifetime upon any occasion or under any circumstances make any statement directly or indirectly derogatory to the United States of America, to Mrs. Beaseley?

A. I did not.

Q. All right; now, we will pass on to the witness Ludwig, who is that individual, a man or a woman?

A. Housekeeper, lady.

Q. When did she work for you, Doctor?

A. After Mrs. Beaseley left.

Q. That is March to October, 1917? A. 1918.

Q. Your memorandum here shows that you had some discussion with [187—97] her concerning the newspapers or something of that sort?

A. We discussed the war occasionally.

Q. The witness in question testified, I understand, that you had, after war was declared, destroyed or done away with many pictures of the Emperor?

A. I could not have done that because I only had one picture in my possession.

Q. Then her statement in that regard is not true, is it, Doctor? A. It is denied.

Q. State whether or not at any time you made any mention to this Mrs. Ludwig, about Washington, Lin-

(Testimony of Frank H. Schurmann.)

coln or Lord Nelson, in derogation or anything of that kind? A. None at all.

Q. The lady in question testified that you at some time or other between March and October of 1917, had in your possession some German uniforms; is that correct? A. Quite correct.

Q. How many did you have?

A. Oh, half a dozen.

Q. What sort of uniforms were they?

A. Those were uniforms for theatrical purposes. I was formerly President of a singing club here and during the entertainments we gave plays and used therein these uniforms, and I might also state here while I am at it, you know, that I asked Mr. Huber to send for those uniforms.

Q. You did ask him? A. Oh, yes, I did, sure.

Q. By letter?

A. No, personally, I called at his office and requested him to remove the uniforms from my office.

Q. When was that call about, about when did you make a call on the United States Attorney in that regard? [188—98]

A. Well, in all probability about six months ago, or five months ago.

Q. And what response did Mr. Huber make to you?

A. Being busy at the time, it being on a Saturday, he would send for them the next Monday.

Q. Did he send for them? A. He did not.

Q. He never sent for them? A. He did not.

Q. Now, as to these uniforms as testified to by Mrs.

(Testimony of Frank H. Schurmann.)

Ludwig, did you at any time make any remarks directly or indirectly in derogation of the United States' principles, constitution, or its aims or purposes? A. Certainly not.

Q. Then you deny the allegations made by the lady yesterday? A. I do.

Q. Did you ever in your lifetime mention Liberty Bonds to Mrs. Ludwig?

A. I am not at all aware of it.

Q. Some mention was made, I understand, by the lady in question, concerning some episode in a theater, or something of that kind, will you please explain that to his Honor?

A. Being very anxious, having read the book by Gerard, "My Four Years in Germany," and the picture being shown here, I was naturally anxious to see how the book would tally with the picture, and being astounded, I would wish to learn further about the conditions which he found in Germany. I went to the theater and was almost mobbed there. I reached home in fear of my life, and I was agitated and perhaps spoke to Mrs. Ludwig about this.

Q. Did you tell her the things that she says you told her at that time? [189—99]

A. Not at all.

Q. Now, let's pass on to a man named Allen; who is that person?

A. Allen is a well-known character.

Q. Is he the man who shot another man down here on Hotel Street? A. Yes.

Q. A man with one arm? A. Exactly.

(Testimony of Frank H. Schurmann.)

Q. When did you first become acquainted or cognizant of that individual?

A. Mr. Allen was sent to me by Theodore Richards in 1913 for medical treatment. He had been on a booze, having been a heavy drinker formerly, and I being well known for handling cases of that description and not dosing them with whiskey, Theodore Richards thought of me and sent him to my office for repairs. He was with me for probably six months.

Q. Under your care as a physician?

A. Yes, and he returned on various occasions for treatment.

Q. Please state to his Honor the character of the relations existing between you and this man Allen, that is, with reference to being upon intimate, friendly or social terms with him, or whether it was more or less the relation existing between patient and doctor?

A. It is quite natural when a patient into whose care the doctor takes a deep interest, you naturally should become a friend of him, and I therefore more or less thought in a friendly manner of him, had discussions of a friendly manner with him.

Q. Especially in view of the particular character of his illness, being a dipsomaniac or something of that kind? A. Exactly.

Q. Was he during the years 1913, 14 and 15 to your observation suffering from anything known as delirium tremens? [190—100]

Mr. HUBER.—Object to that as immaterial.

The COURT.—Overrule the objection; go ahead.

(Testimony of Frank H. Schurmann.)

A. I would state that when I met him first in 1913, then he was perhaps in such a condition that his remarks could have been misconstrued, in other words, that he was then on the verge of the delirium tremens, but not lately.

Q. Not lately, but as a matter of fact, Doctor from a pathological standpoint persons who are affected with dipsomania are not of good and retentive memory, are they?

Mr. HUBER.—Object to that as incompetent, irrelevant and immaterial, it not being shown that this man was affected with dipsomania, and the witness having testified that he was not afflicted at the time.

Mr. McBRIDE.—At any time during the years 1913, 14 and 15, state whether or not in your opinion as a practicing physician the witness Allen was afflicted with what is known as dipsomania.

A. No, I cannot say that.

Q. What was the nature of his troubles, what do you call it?

A. A collapse, following upon heavy drinking.

Q. How does a nerve collapse affect the memory, if any, or does it affect it?

A. I have found that it does not affect the memory, I have found some of the brightest men dipsomaniacs.

Q. Now the witness Allen testified here yesterday, I understand, that during the month of March, 1916, you had discussed with him the so-called "Lusitania" incident. Did you, during said month or at any other time at all, discuss that matter, that is, the

(Testimony of Frank H. Schurmann.)
sinking of the "Lusitania," with Allen, to the best of your recollection? A. Yes. [191—101]

Q. All right, now please tell the Court what you said about that and what Allen said about it.

A. Allen deemed it an outrage, while I thought no passengers should be permitted on munition ships, on ships carrying weapons and arms and materials of war.

Q. Is that the only time you have had any discussion with Allen about that mater?

A. Only once.

Q. Doctor, can you deny his statement to the effect that you had two discussions or more with him concerning the "Lusitania"?

A. Absolutely, I deny that.

Q. You have stated in your testimony here that you were astounded and mentioned in the public press here before, I think, concerning your ability to read, write and speak the German language. Do you read the German language and speak it? A. Yes.

Q. And write it? A. Yes.

Q. How about the English language, do you read that, speak, read and write it?

A. Yes, I think I do.

Q. How about any other language, Doctor, are you familiar with any other languages?

A. I am familiar with the Spanish language, I speak a little French and have studied Latin.

Q. And you have been a student of Literature too, have you not? A. Yes.

Q. And have read what books you could get your

(Testimony of Frank H. Schurmann.)

hands on? A. And I do it now.

Mr. McBRIDE.—That is all, Mr. Huber, with the exception of those letters. I stipulate that original letter dated Honolulu, [192—102] August 26, 1917, addressed to Mr. Huber, United States Attorney, and purporting to be signed by F. Schurmann, as well as carbon copy of what purports to be a reply thereto, dated August 27, 1917, and to have been signed by Mr. Huber, be now offered in evidence on behalf of the defendant, and marked in order.

The COURT.—All right.

(Received in evidence and marked Respondent's Exhibit "B.")

Cross-examination of FRANK H. SCHURMANN.

Mr. HUBER.—In what year were you born, Doctor?

A. In '67.

Q. And you left Germany when twenty years old?

A. Yes.

Q. In 1887, then? A. Yes.

Q. And first went to Australia? A. Yes.

Q. How long were you in Australia?

A. Six years.

Q. What were you doing during that period in Australia?

A. I worked for a newspaper, as newspaper reporter and correspondent.

Q. At that time was it your purpose to make that your permanent occupation or calling?

A. No, having studied druggistry in Germany I intended to follow the medical profession.

(Testimony of Frank H. Schurmann.)

Q. At the end of these six years you came to the United States? A. Yes.

Q. Landing at San Francisco? A. Yes.

Q. That would be in the year 1893? A. Yes.

Q. How long did you remain on the Pacific Coast at that time? [193—103]

A. Only a short time.

Q. And did you live in Mexico? A. I did.

Q. When? A. Probably six years later.

Q. Along about 1899? A. Yes.

Q. How long did you live in Mexico?

A. About seven months, it was only a temporary stay.

Q. And that would be about 1899 or—

A. Yes, thereabouts.

Q. And where did you go from there?

A. Back again to the States.

Q. In what part of the States did you locate?

A. Chicago.

Q. Chicago. Now, can you state any more exactly when it was that you were in Mexico, Doctor?

A. No, I can't state that exactly, not the exact dates, but I can tell you—

Q. All right, what were you doing there?

A. I was in attendance on President Diaz at that time.

Q. As a physician? A. As Osteopath.

Q. Did you become a resident of Mexico?

A. I did not; no.

Q. Doctor, you spoke of Mrs. Beaseley as being always hard up, do you know anything about her

(Testimony of Frank H. Schurmann.)

financial condition or property?

A. Only as far as she would make a request for small sums of money, stating that she needed a little cash on hand as she didn't have any, that she needed to buy this thing or that thing.

Q. Well, you don't know from your own knowledge whether she is a person who has some means or not?

A. No, though I heard from other people that she has been [194—104] practically begging from them, that she lived for instance with the family of Gramberg—

Q. But you have no personal knowledge?

A. No, I have no personal knowledge.

Q. Doctor, you have referred to these uniforms that Mrs. Ludwig, I believe, spoke about and that you afterwards talked to me about? A. Yes.

Q. Can you fix the time of your conversation with me about these uniforms, the time that you came to my office in regard to them relative to the time of the beginning of this action?

A. I can't say whether it was prior or after.

Q. I will ask you to try and recollect if you can, Doctor?

A. My ideas are it was prior. I cannot recall.

Q. You at that time made to me substantially the same statement you made on the stand, that you had some uniforms there that had been used in connection with theatricals? A. Yes.

Q. And that you would be glad to surrender them to our custody if wanted? A. Yes.

Q. Perhaps we can best clear up matters in regard

(Testimony of Frank H. Schurmann.)

to these letters, I don't see that was particularly designated, but your letter addressed to me of August 26, 1917, will you state to the Court the occasion of writing this letter, if you know?

A. I do not know now.

The COURT.—Is that the letter tendering the uniforms?

Mr. HUBER.—No, in regard to the books.

A. There was really no special reason excepting that I felt it my duty to surrender the books to the United States. [195—105]

Q. Now, Doctor, let me refresh your recollection again. Do you recall the first time you came to my office in regard to your book which was the first time as far as I recall that you ever came to my office?

A. No, I don't recollect that occasion.

Q. Well, do you not recollect, Doctor, that you came to my office with a copy of your book and asked me as to whether or not it would be proper for you to sell that book now that the United States and Germany were at war?

A. Exactly, I recall it now most decidedly.

Q. And that you then left with me and I told you that I had not read the book, did not know its contents, and could not give you an opinion or judgment in the matter? A. Sure.

Q. But that I would read the book and do so, do you recollect that? A. I do.

Q. Now, do you remember what followed, do you remember what I said to you after reading the book?

(Testimony of Frank H. Schurmann.)

A. I think you said that as a loyal American, do not sell any.

Q. Yes, and what further was said about referring the matter—do you recall that you requested I refer the matter to the authorities at Washington and to get their opinion? That was your request, was it not?

A. I can't say now if that was my request or if you made that suggestion to me.

Q. And I told you that I would send the book, and did so? A. Yes.

Q. Now, Doctor, isn't it true that this—that following that there was some criticism of your book or your selling the book appeared in the "Advertiser?" [196—106]

A. Most decidedly.

Q. And it was on that account that you wrote me this letter? A. I don't think so.

Mr. McBRIDE.—I inadvertently overlooked reading the letter, I will read it aloud.

Mr. HUBER.—Yes, I would like to have you read it.

Mr. McBRIDE.—This is Doctor Schurmann's letter. (Reading:) Honolulu, T. H., August 26, 1917. Hon. S. C. Huber, U. S. District Attorney, Dear Sir: I beg to draw your attention to the following statement made by the Bystander in today's (Sunday, August 26, 1917) "Advertiser." "Schurmann says he was advised by the Federal Attorney to cease circulating this book on Saturday, August 18th. Why then did he sell at least one copy on Tuesday, August

(Testimony of Frank H. Schurmann.)

21st? I would be glad to submit the proof of this sale to the Federal Authorities." I hereby most emphatically deny that any book was sold by me after Saturday, August 18th, neither do I intend to do so except by permission of the United States Attorney General. With hundreds of copies in circulation here in Honolulu, the "Advertiser" has no doubt found it easy to obtain a copy of the book and then deemed it expedient to add to its countless dirty tricks and lies—by juggling with the date of the sale of the above mentioned book. If the tool employed by the "Advertiser" should be given the third degree he would either break down or perjure himself and further mischief might thus be prevented. I am perfectly willing to deliver into your hands all remaining copies of the Red Book until a decision is handed down by the Attorney General or until a treaty of peace is signed between the United States and Germany. Most respectfully years, (Signed) F. Schurmann. [197—107]

And Mr. Huber's reply is as follows: August 27, 1917. Dr. F. Schurmann, 167 Beretania Avenue, City. Dear sir: Replying to your favor of yesterday, which I have just received, beg to say that I see no necessity for your depositing the books in question with me. The item in the "Advertiser" is an error as to the dates, the fact being that you brought me a copy of your book on August the 18th and it was not until late in the afternoon of August 20th that I gave you my opinion in regard to the same.

(Testimony of Frank H. Schurmann.)

Yours truly, (Signed) S. C. Huber, United States Attorney.

Mr. HUBER.—Do you recall the occasion of your offering these books was on account of the incident referred to in your letter?

A. That is not improbable.

Q. And later the books were requested by my office and you delivered them to the marshal; that is true, isn't it? A. Yes, that is true.

Mr. HUBER.—That is all, Doctor.

Mr. McBRIDE.—That is all. [198—108]

Testimony of Oscar Bernard, for Respondent.

Direct examination of OSCAR BERNARD, for respondent, sworn.

Mr. McBRIDE.—What is your name, please?

A. Oscar Bernard.

Q. What is your business? A. Draftsman.

Q. What is your nationality? A. Frenchman.

Q. Do you know the defendant, Doctor Frank H. Schurmann, in this case?

A. I know him six years and ten months.

Q. Prior to the declaration of war by the United States of America upon the Empire of Germany on the 6th day of April, 1917, that is, before that time, state, Mr. Bernard, whether or not you had occasion to discuss the matter of the war of the United States or Germany with this defendant here?

A. You mean before the war or after the war?

Q. I want you first to tell us as to before the war.

A. Before the war?

(Testimony of Oscar Bernard.)

The COURT.—Before the United States was in it?

Mr. McBRIDE.—Yes, before the United States was in the war.

A. All right, during my association with Doctor Schurmann, it was quite customary for him and I to have a social argument on various subjects. I have never heard from him personally make any specific remark towards the United States Government or any other form of government. We have had these questions and agruments on various lines, and talked time and time again on social argument, and I have never heard him make any specific remark against the United States Government [199—109] or any other form of government.

Q. Are you an American citizen? A. No, sir.

Q. You are loyal to France, are you?

A. I am still considered a Frenchman.

Q. And you are loyal to France?

A. I can't be loyal to two countries.

Q. Which country are you loyal to?

A. I am a subject of the American rule of government.

Q. Then you are, therefore, loyal to the United States of America?

A. Certainly, I can't be loyal to two forms of government, how can I be?

Q. But you are loyal to the United States?

A. Yes.

Q. Now referring to the time before the United States entered the conflict in April of 1917, just give us the time, place, when and the circumstances of

(Testimony of Oscar Bernard.)

some of these discussions and social arguments you had with the defendant, and tell his Honor, Judge Vaughan, what you said and what the doctor said.

The COURT.—Of course, I don't care how many occasions he had or discussions he had, but anything he said that might affect the question of his loyalty.

Mr. McBRIDE.—Whether he was in favor of the United States or against it, or in favor of Germany or against it, and so on.

A. As far as my time which I have observed, I don't believe Doctor Schurmann ever been in the line of talk—I don't think he favored any form of government excepting municipal government from his line of talk which I get.

The COURT.—Only that of the United States, is that what you say?

Mr. HUBER.—I move to strike it out as wholly the conclusion of the witness, and in no sense responsive to the question. [200—110]

The COURT.—Mr. Bernard, they haven't called on you to give your opinion whether he is loyal or not or whether he is in favor of our form of government or not, but they called on you to repeat what, if anything, you heard him say that might enable somebody else to determine whether or not he was loyal or not.

A. I can't recollect any time I heard him state to me personally any specific remark against municipal government.

Q. You say you can't recollect him ever having made any remark, can't ever recall him having made any remark that might throw light on the question

(Testimony of Oscar Bernard.)
whether he was loyal, or how?

A. No, sir; I never heard it.

Mr. McBRIDE.—In any of these discussions or social arguments, Mr. Bernard, that you had with the defendant, did he ever tell you that he was in favor of the American form of government?

A. He told me that time after time, over a dozen times.

Q. Did he say anything to you in any of these discussions as to whether or not he was in favor of or against Prussian autocracy, the Prussian form of government?

A. Well, his social arguments with me, against any of these forms, any of the European forms of government, Prussian government or Kings or rulers, he was not in favor of those people at all.

Q. Now during the six years and ten months that you have stated here you have been acquainted with the defendant, please tell the Court as to the nature of the relations existing between yourself and Doctor Schurmann, you say they were social arguments?

A. Yes.

Q. Where did they take place?

A. They took place at home on the front veranda, and sometimes in the office, in the evening. [201—111]

Q. Were you a roomer at the house there?

A. I was a roomer at his house.

Q. And you had occasion to talk to the doctor many many times? A. Yes.

Q. Now, do you know whether during any of that

(Testimony of Oscar Bernard.)

period of time the doctor had any large portraits hanging on the wall of George Washington, Lord Nelson, Abraham Lincoln and others?

A. He had that.

Q. You saw them yourself? A. I saw them.

Mr. McBRIDE.—Your witness.

Cross-examination of OSCAR BERNARD.

Mr. HUBER.—How long have you been in Honolulu, Mr. Bernard?

A. I came here in 1912, the 13th day of the first part of the year.

Q. And you have been very friendly with Doctor Schurmann ever since that time?

A. We are just the same as two brothers, he borrowed money from me and I borrowed money from him.

Q. Now where were you born, Mr. Bernard?

A. Paris.

Q. And how long have you lived in France?

A. I left there thirteen years of age.

Q. Were your parents French people, of the French blood?

A. French people as far as I know.

Q. And where did you go when you left France?

A. I came to Montreal, Canada.

Q. And how long did you live there?

A. About a year. [202—112]

Q. Where did you go then?

A. Buffalo, New York.

Q. And from there where?

A. Montreal, again.

(Testimony of Oscar Bernard.)

Q. How long did you live in Canada that time?

A. Six months.

Q. Where did you go then? A. Boston.

Q And how long were you there?

A. There about two years.

Q. Then where did you go to? A. Michigan.

Q. And how long were you there?

A. Six months.

Q Where did you go from there?

A. Minominie, Wisconsin.

Q. And from there where?

A. I can't give all I have been to.

Q. But different parts of the United States?

A. I have been all through the United States.

Q. Were you out of the United States after that, before coming here?

A. I have been back and forth between the United States and Canada, but the majority of the time in the United States.

Q. Were you back to Europe after the first time you came to the United States?

A. I went back to France in 1900.

Q. And how long were you there then?

A. Six months.

Q. And then where did you go?

A. Came back to Canada and the United States.

Q. Yes, and have you been back to Europe since?

A. Yes, in 1906.

Q. Where did you go that time? A. Europe.

Q What part of Europe?

A. England, Liverpool, Glasgow, Scotland, Port-

(Testimony of Oscar Bernard.)

land, and in Europe, and back to the United States again.

Q. How long were you in Germany that time? [203—113]

A. I was there twice, the first time I was there ten months and the second time two months.

Q. And in what years?

A. The first time I was in Germany was, I recollect, 1892, I took a course in drawing.

Q. How old were you then?

A. In 1892 I was a young man, I guess—

Q. When were you born, what year were you born in? A. In 1871, the 28th of December.

Q. You stated a while ago that you came to the United States when you were thirteen years of age and did not return to Europe until 1900?

A. To Canada.

Q. But you did not return until 1900?

A. Back to France, I went back to France in 1900, to the Exposition.

Q. But I understood you did not leave the United States except to go to Canada after you came, when you were thirteen, until 1900. Now, did you ever live in any part of Canada except Montreal?

A. I have been working in every city in Canada, in six cities in Canada.

Q. In Quebec? A. I have been there.

Q. How long? A. As a visitor.

Q. You never lived there?

A. I had to live one week, two weeks, sometimes two months.

(Testimony of Oscar Bernard.)

Q. And what have you been employed at since you have been in Hawaii, Mr. Bernard?

A. I have been employed all around. When I first came here I went in an office as a draftsman. I have been trained in school mechanical in Canada.

Q. Who are you working for now? [204—114]

A. Working for myself just now.

Q. How long since?

A. Oh, about five weeks now.

Q. And just before that who were you working for? A. Inter-Island.

Q. How long did you work for them?

A. About four years.

Q. And what class of work were you doing there?

A. Ship carpenter.

Q. About four years? A. Yes.

Q. You say you never heard Doctor Schurmann say anything against the United States?

A. No, personally I never heard it.

Q. Did you ever hear him say anything in favor of the United States? A. Yes.

Q. What did you hear him say?

A. Heard him say he was in favor of Republican form, United States, because more privileges and more freedom from monarchical government.

Q. Can you read and write, Mr. Bernard?

A. I can in French a little bit, but English not very well.

Q. Do you read any English?

A. Some, but I am not a scholar.

Q. You do not read English?

(Testimony of Oscar Bernard.)

A. No, because I only use it in my line of drawing, I don't use it in writing.

Q. Now, Mr. Bernard, you wrote an endorsement on his book, "The War as Seen Through German Eyes," did you not?

A. I have a letter there.

Q. This is your letter, is it not?

A. I dictated the letter to Doctor Schurmann, he wrote and I signed. [205—115]

Q. He read it to you after you dictated it?

A. Yes.

Q. And got it correct? A. Yes.

Q. As it has been printed in the book?

A. Yes.

Q. And it is correct, is it?

A. I dictated the letter to Doctor Schurmann, he wrote and read to me afterwards, and I signed.

Q. And it has been read to you as it appears in the book? A. Yes.

Q. And that is your sentiment? A. Yes.

Q. Mr. Bernard, have you had any conversation with Doctor Schurmann about a bomb? A. Yes.

Q. And you were going to make a bomb for him, were you? A. A bomb loaded with tobacco.

Q. When was that?

A. Some time about a week after we had the picture of Germany.

Q. You were with Doctor Schurmann that night at the show, were you?

A. Well, I bought the ticket and took him with me.

Q. And why did you make that bomb?

(Testimony of Oscar Bernard.)

A. Made it to run a bluff if there was any opportunity to appear again, but I didn't go there no more with Doctor Schurmann after that.

Q. Did you and Doctor Schurmann talk about that bomb that night after the show? A. Next day.

Q. In the morning? A. Yes.

Q. And in that conversation did the doctor tell you that he wished he had the bomb that night?

A. No. [206—116]

Q. What did he say about the bomb the next morning?

A. He asked me if I could make one for a bluff, and I suggested I make one but must not use explosive at all. He said to put tobacco, so I bought sack Durham tobacco—sack Red Indian and load it with that, it was made out of box of bottle of ink.

Q. He asked you to make the bomb, did he?

A. Yes.

Q. He asked you to make a bomb, did he?

A. Yes.

Q. Did you give it to him?

A. No, it wasn't made when the Marshal Smiddy came, it wasn't done yet. It wasn't ready with paint, only wanted a coat of paint.

Q. Now, Mr. Bernard, is that the only bomb you have had anything to do with?

A. Well, I tell you truth about it first one I made, but I have knowledge to produce bombs.

Q. You know how to make them? A. Yes.

Q. And you have talked about it to the doctor, haven't you?

(Testimony of Oscar Bernard.)

A. Only time I talk with him, but I can make bombs, I can do that.

Q. And this conversation that you had with the doctor about the bomb was the next morning after you had been over to the picture show?

A. We *talking* about it this second day after I made the bomb and loaded it with tobacco and put on my shelf to dry and add one more coat of paint to give to it and didn't dry.

Mr. HUBER.—That is all.

Redirect Examination of OSCAR BERNARD.

Mr. McBRIDE.—Now, let's inquire a little more about this bomb [207—117] that counsel has been interrogating you about. What was it made out of?

A. The first part was paper box which we got, buy bottle of ink in.

Q. That is the package enclosing the bottle of ink?

A. Three and a half inches long and three-quarters diameter, and the doctor speak to me, and I says, "Yes, I will make that, and we musn't use no chemical."

Q. Did you use any chemicals in it?

A. No, he suggested to me to put tobacco in and I said all right, not chemical, we will use that.

Q. What kind of tobacco did you use in this bomb, Bull, tobacco? A. Red Angel, Red Indian.

Q. And you say you gave it one coat of paint?

A. Yes.

Q. And hung it up to dry? A. Put on shelf.

Q. And it was on the shelf in your room in plain sight of everybody, wasn't it? A. Yes, not high.

(Testimony of Oscar Bernard.)

Q. No, because Marshal Smiddy put his hand on it as soon as he walked in, and he did put his hand on it as soon as he walked in, and grabbed it?

A. He put hand on it, he wasn't afraid.

Q. He wasn't scared then?

A. No, he put it in his pocket.

Q. And you say that you have knowledge of how to make bombs but you never made any real ones?

A. Well, I know he against the law, and we can't make these bombs in a place containing vibration, they can't be made.

Q. That is, you have to have a special concrete base or foundation?

A. Yes, or go in mountain, the rocks, somewhere where no vibration, [208—118] even not that place here.

Q. The United States have these sort of places?

A. Yes.

Q. And I understood you to say one other reason why you wouldn't make a regular honest-to-goodness bomb was because it is against the law, is that right?

A. Yes, and in second place you couldn't make any kind of explosion without chemicals.

Q. And you have never secured any ingredients for bombs from anybody? A. No.

Recross-examination of OSCAR BERNARD.

Mr. HUBER.—Have you ever applied for citizenship or taken out any citizenship papers in the United States?

A. No, sir.

(Testimony of Oscar Bernard.)

Q. And you do not claim to be an American citizen?

A. Not me, and the authorities that published that I never claimed to be. I have applied here to the District Court here and asked information and it was not granted to me, he said I couldn't get citizen papers. At that time I had to have citizen papers to work in the Navy Yard, couldn't get in without that and it was of my interest to get it and go to work in Navy Yard or get out of here.

Q. What you lacked was witnesses to testify to your residence?

A. Well, the clerk at that time was a young man, he told me at the time of the war I couldn't become a citizen and I asked [209—119] no more information, turned around and walked off.

Q. Mr. Bernard, Doctor Schurmann has read his book to you, has he not? A. A part.

Q. And you agreed with those sentiments?

A. In a way.

Q. In a way?

A. Lots he read to me I don't agree.

Q. You know the doctrines of socialism?

A. He is socialistic.

Q. You are a socialist, are you not?

A. I was.

Q. You recognize yourself as such?

A. I am known to be one for many years.

Q. And you know the present doctrine of Bolshevism as announced from Russia and spreading throughout Europe and elsewhere, do you not?

(Testimony of Oscar Bernard.)

A. Well, I know something about it, I don't claim to be that kind of a socialist.

Q. You do not subscribe to these doctrines?

A. No, you have record of me in San Francisco to be one for many years.

Q. I am asking you if you know what this Bolshevism is and if you believe in that?

A. I am known to be revolutionist and socialist in the form of peace. I do not stand for any war or any force.

Q. And you don't subscribe to war at any time and for any cause?

A. I was not subscriber for war at any time.

Q. In other words, you do not believe in war for any cause, is that it? [210—120]

A. I don't support any war, but I was forced to support and donate and I have donated very much against my will.

Q. Your principles did not approve of it, that is, you mean that you have contributed but your principles did not approve?

A. I don't spend for any war at all.

Q. And not now do you approve of it?

A. I don't approve of it at no time.

Redirect Examination of OSCAR BERNARD.

Mr. McBRIDE.—But you are glad the war is over, are you not, Mr. Witness?

A. I am glad, because want to get out of here.

Q. But you are glad now that the war is over?

A. Yes.

Q. Glad to see it ended? A. Yes.

(Testimony of Oscar Bernard.)

Q. You are glad to see all of this brutality ended, people losing their lives and things of that sort?

A. Don't stand for any brutality at all.

Q. And you are not a Bolshevist?

A. I don't think I am at all.

Q. And as far as the question of loyalty is concerned, Mr. Bernard, you claim to be loyal to the United States of America?

A. Chemically interested, yes; but I don't stand for war.

Q. And you like the rule of action of the United States?

A. I understand more of the rule of action of the United States than any form of government, never had any trouble with anybody and willing to stay that way. All I ask them is privilege to earn my living, that is all I ask. [211—121]

In the United States District Court, in and for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Respondent.

Honolulu, H. T., January 9, 1919, 10:00 A. M.

Mr. McBRIDE.—At this time, if the Court please, I ask leave in view of the circumstances to recall Doctor Schurmann simply for the purpose of one or

(Testimony of Frank H. Schurmann.)
two questions which in the hurry the other day I overlooked.

The COURT.—Very well.

Testimony of Frank H. Schurmann, for Respondent (Recalled).

Direct examination of FRANK H. SCHURMANN, for respondent, recalled.

Mr. McBRIDE.—Doctor Schurmann, with reference to the witness Holliday, please state, if you know, what his nationality is.

Mr. HUBER.—Object to that as incompetent, irrelevant and immaterial, your Honor.

The COURT.—Objection overruled. [212—122]

A. Mr. Holliday is British.

Mr. McBRIDE.—State whether or not Mr. Holliday knew that you personally had no love for the English as contradistinguished from the British.

Mr. HUBER.—I object to that as calling for a conclusion of the witness.

Mr. McBRIDE.—Withdraw the question and will put it another way.

Q. State whether or not you ever informed the witness Holliday as to your feelings towards the English people as contradistinguished from the British people, answer yes or no.

A. Not about the English people but the English policy.

Q. What did you tell him?

A. I told him I did not agree with the policy of

(Testimony of Frank H. Schurmann.)

England as shown by history, especially the ill-treatment of Ireland.

Q. As a matter of fact, Doctor, the discussions or disputes between you and the witness Holliday arose from the fact that you did not believe in the policies of England towards Ireland, and he on the other hand did believe therein, is that the idea?

A. Yes.

Q. And I will ask you in a general way if that is not the policy also of the Mrs. Beaseley who testified here? A. Yes, sir.

Q. What nationality is Mrs. Beaseley?

A. She is English.

Q. Is that also true as to Mrs. Ludwig?

A. She is also English, yes.

Q. And the same discussion arose in the same manner, you holding to one belief and she holding to the other as to the policy [213—123] of the English towards Ireland? A. Yes.

Q. And towards the English policy generally?

A. Yes.

Mr. McBRIDE.—That is all, Doctor.

Mr. HUBER.—I don't care to ask any questions. No cross-examination. [214—124]

Testimony of S. C. Huber, for Respondent.

Mr. McBRIDE.—We will call Mr. Huber to the stand. We will waive the oath.

The COURT.—Swear him.

Direct examination of S. C. HUBER, for respondent, sworn.

(Testimony of S. C. Huber.)

Mr. McBRIDE.—Mr. Huber, you are the duly appointed, qualified and acting United States Attorney in and for the District and Territory of Hawaii, are you not? A. I am.

Q. When did you assume the incumbency of that position?

A. Some time during the month of May, 1916, I cannot tell the exact date.

Q. But at any rate during the middle part of the year 1916 you were appointed and assumed the functions of that office?

Q. And ever since that time you have been acting in that capacity? A. Yes.

Q. And are now acting in that capacity?

A. Yes.

Q. Mr. Huber, where were you born?

A. In Perry County, Pennsylvania.

Q. Where were you raised, Mr. Huber?

A. In the State of Pennsylvania. I lived one year in the State of Maryland during my boyhood, and when sixteen years of age went to Kansas and returned to Pennsylvania and lived there until I was twenty-one, and went to Iowa for twenty-four years, then came to Hawaii. [215—125]

Q. Where were you educated?

A. For three years I attended school in Kansas, and one year I taught of that period.

Q. Where did you receive your technical education?

A. In the State of Pennsylvania, at Lebannon College, Anville, Pennsylvania.

(Testimony of S. C. Huber.)

Q. Of what descent are you, Mr. Huber?

A. I presume you would say Pennsylvania German. My ancestry, both on my mother's and father's side came from Switzerland, but German-speaking Swiss, and the language of that section of Pennsylvania was Pennsylvania Dutch, as it was called.

Q. Now, Mr. Huber, please state to the Court the first time that any complaints were made to you in your official capacity concerning the defendant in this matter, as to whether or not—as to whether he was or was not a loyal citizen of the United States of America?

Mr. BANKS.—I don't believe that is competent, if your Honor please.

The COURT.—That is immaterial, sustain the objection.

Mr. McBRIDE.—Mr. Huber, state whether or not complaints were made to you concerning Doctor Schurmann, the defendant in this case, as to whether he was or was not a loyal citizen of the United States of America, by persons other than those who have been introduced by the prosecution at this hearing.

Mr. BANKS.—Object to that, if the Court please.

The COURT.—Sustain the objection.

Mr. McBRIDE.—Mr. Huber, it appears from the Bill in Equity filed in this matter that the same was based upon the affidavit of one Mrs. Jeannette Ryan. Will you please explain to the Court why Mrs. Jeannette Ryan was not called as a witness in this case? [216—126]

(Testimony of S. C. Huber.)

Mr. BANKS.—Object to that, if the Court please.

The COURT.—Overrule the objection.

Mr. HUBER.—At the time that the affidavit of Mrs. Ryan was attached to the petition, I was advised that she could be found in Oakland, California. I endeavored to locate her there, and also at another possible address, which was some place in Ohio, I don't remember which, but both efforts to locate her failed and I have been unable to find Mrs. Ryan since the time of the commencement of this action.

Mr. McBRIDE.—I don't care to be—I don't care about the exact date, Mr. Huber, but about how soon was it after the commencement of this equity matter that Mrs. Ryan, according to your present recollection, left the jurisdiction of this Court?

A. I think, as a matter of fact, that she left before, but I didn't know it until a short time after the filing of the petition, say within a week.

Q. Was any subpoena ever issued for Mrs. Ryan?

A. No, sir.

Q. You have stated, Mr. Huber, that you made various efforts to locate Mrs. Ryan during the pendency of this matter. Will you be good enough to explain generally what efforts were made in that direction?

A. Yes, I wrote to the addresses I had been given and conferred with the parties personally, those in the city that I was told would have information, and by correspondence with others.

Q. Did you take the matter up with any of the United States federal officials in these States?

(Testimony of S. C. Huber.)

A. I think I did in San Francisco. I know I did other features of the case, but as to Mrs. Ryan I wouldn't be positive.

Q. State whether or not, Mr. Huber, any complaints concerning the [217—127] loyalty or otherwise of Doctor Schurmann as an American citizen were made to you by any of the members of the so-called Hawaii Vigilance Committee, that is, Mr. Bockus, Mr. Cooke, Mr. John Watt or any other members of that—

Mr. BANKS.—Object to that, if your Honor please.

The COURT.—I can't see the relevancy of the matter, but at the same time I can't see what harm it will do. Overrule the objection.

Mr. HUBER.—Certain information was furnished to me by the Hawaiian Vigilance Corps, but not by any of the persons stated.

The COURT.—The Court understands the question was, was any complaint made to you by the parties named?

Mr. McBRIDE.—That is the question, your Honor.

Mr. HUBER.—I could answer that no.

Q. As a matter of fact, Mr. Huber, the institution of this equity proceeding was at the instigation or suggestion of the Hawaiian Vigilance Committee, was it not as contradistinguished from *from* any investigation of your own, you moved at the instance of the committee?

(Testimony of S. C. Huber.)

Mr. BANKS.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Overrule the objection, go ahead and answer it.

Mr. HUBER.—If the Court please, in that connection I would want to answer that fully, and not testify yes or no.

The COURT.—All right.

Mr. HUBER.—In accord with the policy of the Department of Justice relative to the war, the Department of Justice asked for the co-operation of all citizens and especially of certain organizations like the Hawaiian Vigilance Corps and the American Protective League, and that fact was well known to the Hawaiian Vigilance Corps. In fact, at my request the Hawaiian [218—128] Vigilance Committee appointed a special committee that was to confer with and co-operate with my office, and they have done so throughout the progress of the war, and Doctor Schurmann's case, together with other matters bearing upon the crime or dealing with the conduct of the war have been discussed at numerous times between my office and this committee, and at times I dealt with other members, just as a great many citizens have brought information of one kind or another to my office. There was no difference in this case and that of any other activities along the same line.

Mr. McBRIDE.—Will you please state what has been the general attitude of the defendant in this cause from the inception thereof as regards being

(Testimony of S. C. Huber.)

defiant towards this attempt to cancel his citizenship or as to being anxious and willing to have the matter cleared up?

A. If you will permit me, I will state just what was done in that regard. The regulations under which the denaturalization was begun was a circular letter addressed to all United States Attorneys that no proceeding shall be begun before the matter is first submitted to the Attorney General. This was submitted to the Attorney General, with authority to commence this proceeding. At the time of receiving that authority I wrote—or upon the receipt of that authority I at once dropped a note to Doctor Schurmann asking him to bring to me his certificate of naturalization. He very promptly did so, I think the following day or just as soon as it could be done in the course of the mail.

Q. He interviewed you personally, did he not?

A. He brought the certificate personally.

Q. During that first conversation regarding the certificate, Mr. [219—129] Huber, what was the attitude of the defendant, I mean, did he act defiant or perturbed or what was it?

A. I only remember one thing. Doctor Schurmann I don't think was in the office a minute at that time, but he said he received my letter and brought the certificate in response to it, and I remember just one thing that was said at that time, the doctor said, as he turned to go out, he said, "I hope this does not mean any more trouble for me," or words to that effect.

(Testimony of S. C. Huber.)

Q. His manner was entirely dignified, was it not?

A. Nothing unusual about it to attract attention.

Q. He didn't fly off the handle or get hot tempered or do any other thing than what you have indicated?

A. No, sir.

Q. With regard to the Red Book, "The War as Seen Through German Eyes," which has been introduced as an exhibit for the Government in this case, you read that book, did you not, Mr. Huber?

A. Yes, sir.

Q. You likewise read, did you not, sundry and divers articles appearing in various publications in the United States of America and in Hawaii, which is a part thereof, during the years 1914, 15 and 16, wherein was debated the proposition whether the United States should enter the war, you read those articles, have you not?

A. I have read articles, but I don't know that I have read any articles which you have in mind.

Q. But along that subject?

A. I read a good deal on that subject.

Q. As a matter of fact, Mr. Huber, I have never read the book myself and hope I will not have to just yet, but Mr. Huber, as [220—130] a matter of fact, however, from your knowledge of this book and your knowledge of the other articles we are talking about along that general subject, are you not in a position to say with a few exceptions which you can later point out that this book is along the lines of the articles in question, the same general articles?

Mr. BANKS.—Object to that as incompetent, ir-

(Testimony of S. C. Huber.)

revelant and immaterial to compare this book with other articles.

The COURT.—Sustain the objection.

Mr. HUBER.—Now, if the Court please, I would like to make a statement in regard to the book. I can see how this statement can leave me in an improper position in regard to the book.

Mr. McBRIDE.—Then I think the whole thing should be gone into, and I respectfully warn the Court that if the gates are put down now that I want to go into the whole matter.

The COURT.—The witness is not going to relate any conversation, as I understand it, or his opinion of the book?

Mr. HUBER.—I would have to, your Honor, because I did express it and it would leave me in this position now on the stand that that kind of question would make it appear as though I might have expressed an opinion different from the opinion I did express and I don't want to be left in that situation. I am not here as a witness for the defendant, but as a voluntary witness to perform any duty under the law.

The COURT.—Read the question.

(Last question read.)

Mr. BANKS.—I will withdraw my objection.

Mr. HUBER.—I don't think that I should answer that question. I am not here as an expert on this book and don't think I [221—131] should testify, but to leave this record in that form would perhaps lead to a public impression that I had endorsed or ap-

(Testimony of S. C. Huber.)

proved of that book. Doctor Schurmann the other day did come into the question of bringing the book to my office and related part of what was said,—or in relating part of what was said, I don't propose in this statement to make any statement I did not make to Doctor Schurmann.

The COURT.—I will permit you to make any statement you made to Doctor Schurmann as part of the conversation he related.

Mr. HUBER.—On Saturday, the 18th day of August, 1917, just a little before noon, Doctor Schurmann came to my office with a copy of his book. It was the first time I had ever exchanged words with Dr. Schurmann, and he asked me whether in my judgment he could properly sell that book at that time, meaning that was on August the 18th, 1917.

The COURT.—After we were then at war?

A. After we were then at war, and referring to this time, I refer to our country being at war. I told him I could not give him an opinion on that subject because I never seen the book, never read a line of it, and knew nothing only what I heard about it, but that I would be glad to read the book and give him my opinion. Now, this was on Saturday, just before noon, and the office closes at twelve o'clock. Between Saturday and Monday I did read the book and advised Doctor Schurmann in my judgment he should not sell or circulate the book, that it would be improper on account of the war. In that conversation the doctor suggested that I get a ruling from Washington on that same question and I told him that I

(Testimony of S. C. Huber.)

would do so, and did, I at once sent a copy of the book to Washington and told them I had so advised the doctor [222—132] and asked whether they concurred in my judgment. In due course of the mail I received a letter from the Attorney General stating that they did concur in my judgment, and that no loyal citizen would at that time, referring to the time of the war, circulate the book, and I immediately dropped Doctor Schurmann a line that I had received such a reply in regard to the inquiry made. The letter that is in evidence that Doctor Schurmann wrote to me which was written within the week that this transaction occurred makes reference to his bringing the book, makes reference to the fact that it was sent to Washington for a ruling and in that connection he suggested that he turn over the books pending the ruling. That was my statement I wished to make, and I trust your Honor will see that it is a proper explanation under the circumstances.

The COURT.—That is relevant to the matter that has already been testified to by the defendant, but the question as to whether or not in your judgment this book was in line with or like other propaganda of the same type in 1914 and 15 is altogether immaterial, and I sustain the objection to it.

Mr. McBRIDE.—Very well. Mr. Huber, you have just stated over the objection of counsel for the defendant that you read the book between Saturday and on Monday, I think it was. A. Yes.

Q. For the purpose of giving to the defendant your opinion as to whether or not the further sale or cir-

(Testimony of S. C. Huber.)

culation of this book was proper? A. Yes.

Q. And you read the book carefully, did you, page by page, and word by word?

A. I read it all. [223—133]

Q. Completely? A. Yes.

Q. And from your reading of the book you arrived at the conclusion in your own mind that that was a publication that was offensive to every loyal citizen of the United States or something along that line, what opinion did you come to?

A. I felt that the circulation of that book at this time would be in line with discouraging American loyal activities and encouraging the enemy's loyalty.

Q. In what regard, how?

A. Well, in a number of respects, its especial eulogy of Prussian autocratic ideas, its justification of the sinking of the "Lusitania" and its special reference thereto. One thing I remember particularly, that it spoke of while the Germans in this country who were naturalized might observe their oaths to the United States, that the many Germans in the country who had not taken such oaths would probably not restrain themselves, and I could say, Mr. McBride, that I don't believe there is a subject treated on that bears out the idea or that was in harmony with what my ideas of what American loyalty consists of.

Q. Well, you claim, Mr. Huber that the book contains statements untrue, matters that are not true as a matter of history or common knowledge, is that

(Testimony of S. C. Huber.)

what you claim, or is it the conclusions rather than any statement of fact?

A. Well, there are some statements of fact I never have had verified and I don't know whether they are true or not, but what I objected to more particularly was the conclusions that were drawn and the manner in which the whole subject was treated. It seemed to me that it was just as the doctor himself so well expressed it the other day, clearly propaganda for the purpose [224—134] of keeping America out of the war, and that of course was German propaganda at that time.

Q. Mr. Huber, let me ask you this question, would your opinion have been in any manner or wise, affected, modified or changed should you have been called upon to pass upon the book and render an opinion thereupon during, for instance, the month of July, 1916?

A. Yes, I think it would, Mr. McBride.

Q. In what regard?

A. Because my attitude toward the whole war was such that I could not endorse any—there never was a time that I could have endorsed any of these sentiments.

Q. At any time at all?

A. No. I remember I travelled through Europe in 1911, and I went through England also, and through Germany. My two daughters spent five years in these countries just prior to the war, and in letter after letter when they were in Germany they

(Testimony of S. C. Huber.)

spoke of the signs and the preparations for war, and I saw it afterward.

Q. In both countries, England and Germany?

A. No, I did not see it in England, I did not see it in any other country except Germany, but there was not a single place that I was in Germany where there were not large numbers of troops assembled. I remember the King of Sweden in Berlin when I was there, I saw him and the Kaiser together on several occasions, Unter den Linden, for the purpose of surveying troops. There were large masses of troops assembled, you could not go a single place that you did not confront preparations for war, and that, with the other knowledge I had received through my daughters and from other sources made me feel that the war [225—135] was not in accord with Germany's explanation, that is, the beginning of the war in accord with Germany's explanation of it but entirely in harmony with what England and France claimed in regard to it, so having that viewpoint to begin with I could not agree with any of these statements because they were so contrary to what I understood to be the fact.

Q. Then I take it that your opinion was somewhat affected by the personal knowledge you had of conditions in Germany acquired in 1910, and also from the correspondence from your daughters, or your family, information, that had a lot to do with it, had it not? A. Undoubtedly.

Q. And I take it also from the general trend of

(Testimony of S. C. Huber.)

your remarks that you are personally opposed to war, are you not? A. No.

Q. Rather, opposed to the preparations you saw or observed there?

A. I did not say I was opposed to them, I said I saw them.

Q. And you didn't like them?

A. Oh, no, I simply observed them, and I knew they were being prepared for a purpose, all that preparation was not simply for show, but for a purpose. My father carried a musket in the Civil War and I would be mighty glad to carry one in this if my opportunity came.

Q. So you claim, then, that in your judgment and opinion and from the personal knowledge you acquired, as stated, that the circulation of this publication was just as offensive to a loyal American citizen and each and every one thereof during, for instance, the year 1916, as it would be now?

A. I don't know how it affected anyone else. I know how it affected me and how I think it would affect any loyal American [226—136] citizen. I don't believe any loyal citizen would subscribe to the things advocated in that book.

Q. You being more familiar with the publication than I am, Mr. Huber, will you be kind enough to point out what, in this publication, in your judgment, constitutes a direct attack against the United States of America?

A. I would not say that there was anything—

Mr. BANKS.—I object to that.

(Testimony of S. C. Huber.)

The COURT.—You can argue that out when the time comes. The book is introduced in evidence already. The Court has read the book, and whether or not it does have the effect to show disloyalty is for the Court to decide, and not for the District Attorney.

A. I expected to point those things out in argument, but I am willing to do it under oath.

The COURT.—I think you have gone sufficiently into Mr. Huber's personal opinion in regard to the matter.

Mr. McBRIDE.—Now, Mr. Huber, in regard to the matter of some uniforms that have been testified to in evidence here, tell us what you know about that proposition, please, generally.

A. Yes, sir. I know that it was a short time after this bill was filed, I would say within two weeks, it may have been within a week, and that again was on a Saturday. Doctor Schurmann came to my office and said something that he thought perhaps he ought to tell me. I asked what it was and he said he had at his home, I believe, about a half a dozen, he said, I wouldn't be certain about the number, he may have said that or he may have said a few, German uniforms that he had obtained for the purpose and used in connection with amateur theatricals, I think he said in connection with some singing club or society [227—137] that he was connected with, and that there might be some point made against him on account of him having the uniforms and he wanted us to know that he would be glad to turn them over to us and asked if I would not send over for them,

(Testimony of S. C. Huber.)

and I told him I could not send after them then. I know there was some particular reason that the doctor may remember, but I don't know just what it was, but I said if we want the uniforms I will send over for them on Monday, I think, or later, I don't remember whether I fixed a time, but I concluded in my own mind that there was nothing in the possession of these uniforms that was either beneficial or harmful to the Government, and I never sent for them.

Q. And as a general proposition would you say from his explanation of this proceeding, that from the inception of this case down to the present time that the defendant, Doctor Frank H. Schurmann in this case, has responded willingly, immediately and promptly to all requests made of him by the Government officials?

A. Well, I have made no requests of him. He has always been here when it was proper for him to be in court, and there have never been any favors asked one way or the other.

Q. I mean, has he ever refused to make any explanation demanded of any kind?

A. No, he has not, but I have never asked anything of him that I know of except to deliver the books at one time and to bring in his naturalization certificate another time, and he did both.

Q. Now, let us refer to this bomb incident that seems to have interested the press so much this morning and yesterday. About when was that, do you know? [228—138]

(Testimony of S. C. Huber.)

A. Yes, well, I would say the last week in September.

Q. Of 1917?

A. Yes, I was in Hilo, or on the Island of Hawaii during the incident at the Bijou Theater. I think I went to Hilo the 19th of September and was gone about a week, and the bomb incident occurred immediately after my return from Hilo, so I would say it was about the last week in September.

Q. Did United States Marshal Smiddy submit the bomb to you? A. Yes.

Q. And did you examine it? A. Yes.

Q. Did you have it analyzed by mechanical experts to—chemical experts to find out its ingredients?

A. No, sir.

Q. What was in the bomb, Mr. Huber?

A. Smoking tobacco.

Q. Is that all that was in it?

A. All we could find.

Q. It was all torn apart? A. It was cut open.

Q. And that was all that was in there, smoking tobacco? A. Yes.

Mr. McBRIDE.—That is all, thank you, Mr. Huber.

Mr. BANKS.—I have no questions, Mr. Huber; is there any statement you want to make? A. No.

The COURT.—Did I understand your statement Mr. Huber, that the defendant, in the fall of 1917, wished to circulate these books?

A. Well, he simply brought the book to my office and asked me whether it would be proper for him to

(Testimony of S. C. Huber.)

sell and circulate the book at that time, and I expressed the opinion, as I stated, that it would not, that is after reading the book, but not in that conversation. [229—139]

Q. When you expressed your opinion he wished you to get a decision from the Attorney General on it? A. Yes, sir.

Mr. BANKS.—Did he want to know whether it would be a violation of the law, Mr. Huber, to circulate that book, or what?

A. I would not state at this time whether he said anything about the law. My best recollection would be that he asked whether it would be proper for him. I have no independent recollection, and I have refreshed my recollection by referring to my letter to the Attorney General, but I used the word proper there in the letter written within three days after it occurred, so I am inclined to believe what he said at that time was, whether it would be proper.

Mr. BANKS.—That is all.

Mr. BANKS.—We have nothing further.

Mr. McBRIDE.—The defendant rests.

(This closed the testimony in the above-entitled cause. [230—140]

Honolulu, H. T., March 11, 1919.

I hereby certify that the foregoing transcript of testimony, consisting of one hundred and forty (140) typewritten pages, is a full, true and accurate transcript of my shorthand notes of the testimony taken and the proceedings had upon the trial of the case of the United States of America vs. Frank H. Schur-

mann, upon the days and at the times in said transcript mentioned.

H. F. NIETERT,
Official Reporter, United States District Court.
[231]

United States District Court in and for the Territory of Hawaii.

OCTOBER TERM, A. D. 1918.

PETITION FOR CANCELLATION OF CERTIFICATE OF CITIZENSHIP.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.

FRANK H. SCHURMANN,
Defendant and Appellant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

YOU WILL PLEASE prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Bill in equity, filed Aug. 27, 1918.
2. Appearance and answer of defendant, filed Oct. 25, 1918.
3. Motion for a continuance, filed Jan. 7, 1919.
4. All of exhibits of plaintiff-appellee.
5. All of exhibits of defendant-appellant.

6. Opinion of Court, filed Jan. 18, 1919.
7. Decree, filed January 15, 1919.
8. Notice of appeal.
9. Bond on appeal.
10. Order allowing appeal.
11. Orders extending time to transmit record on appeal.
12. Assignment of errors.
13. Citation on appeal. [243]
14. Petition for and on appeal.
15. Stipulation re transcript of testimony.
16. Notice of filing bond on appeal.
17. Transcript of testimony.
18. This praecipe.
19. Certificate of clerk to transcript of record.

Said transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the clerk of said Circuit Court of Appeals at San Francisco, State of California, before the 10th day of August, A. D. 1919.

(S.) C. H. McBRIDE,
Attorney for Defendant-Appellant.

Dated Honolulu, Hawaii, July 10, 1919. [244]

In the District Court of the United States in and for the District and Territory of Hawaii.

EQUITY—No. 10.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK H. SCHURMANN,
Respondent.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, A. E. Harris, Clerk of the District Court of the United States for the District and Territory of Hawaii, do hereby certify the foregoing pages, numbered from 1 to 245, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the cause The United States of America, Plaintiff, vs. Frank H. Schurmann, Respondent, No. 10, as the same remains of record and on file in my office, and I further certify that I hereto annex the original citation on appeal and five (5) orders extending time to transmit record on appeal and two (2) original exhibits in said cause.

I further certify that the cost of the foregoing transcript of record is $26.90, and that said amount has been paid to me by the respondent in this cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 29th day of November, A. D. 1919.

[Seal] A. E. HARRIS,
Clerk United States District Court, Territory of Hawaii. [245]

[Endorsed]: No. 3422. United States Circuit Court of Appeals for the Ninth Circuit. Frank H. Schurmann, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Filed December 15, 1919.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3422

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK H. SCHURMANN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

C. H. McBRIDE,
Honolulu, T. H.,
Attorney for Appellant.

S. JOSEPH THEISEN,
San Francisco, California,
Of Counsel.

No. 3422

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK H. SCHURMANN,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

This appeal brings in review a decree setting aside and cancelling, under Par. 15 of the Act of June 29, 1906, 34 Stat. at L. 596, 601, Chap. 3592, as fraudulently and illegally procured, a certificate of citizenship theretofore issued to appellant herein by the Superior Court of Los Angeles County, State of California, on December 17, 1904.

History of the Case.

On August 27, 1918, the United States Attorney for the District and Territory of Hawaii filed in the United States District Court in and for the Terri-

tory of Hawaii, at the April Term, A. D., 1918, a bill in equity, wherein United States of America was named as plaintiff, and Frank H. Schurmann was named as defendant, praying for the cancellation of certificate of citizenship theretofore issued to said Frank H. Schurmann, and for general relief (see Transcript of Record, pp. 9 to 21); on October 25, 1918, the defendant, *in propria persona* (being unable to obtain the services of counsel—see Transcript of Record, p. 295) filed an appearance and a demurrer (which he denominated an answer—see Transcript of Record, pp. 21 to 23) which demurrer was presented by him and was by the court overruled (see Transcript of Record, pp. 249 to 253); that he, likewise *in propria persona,* filed an answer (see Transcript of Record, pp. 26 to 33); on October 28, 1918, the cause was set to be heard on October 31, but the hearing was actually commenced on October 29, 1918, the plaintiff appearing by S. C. Huber, United States District Attorney, and J. J. Banks, Deputy United States District Attorney, and the defendant appearing in person and without counsel (see Transcript of Record, pp. 222 to 227); after taking the testimony of several witnesses the cause was continued until January 6, 1919, on which date the further hearing was resumed, the defendant still being without counsel (see Transcript of Record, pp. 249 to 292). On January 7, 1919, C. H. McBride entered his appearance as attorney for defendant and made an oral motion for a continuance (see Transcript of Record, p. 7 and pp.

293 to 296), followed by a written motion for a continuance (see Transcript of Record, pp. 34 to 39), both motions, oral and written, for a continuance being denied, and also made an oral motion for leave to withdraw the defendant's answer (filed *in propria persona)* and file in lieu thereof, within one hour from that time, a new answer which motion was likewise denied (see Transcript of Record, pp. 297-298); testimony was introduced by both sides, argument heard and the cause submitted to the court for consideration; on the 15th day of January, 1919, written decree was entered in said cause, setting aside and cancelling the certificate of citizenship theretofore issued to the defendant (see Transcript of Record, pp. 198 to 200); on January 20, 1919, a written opinion was filed setting forth the reasons for the cancellation of said certificate of citizenship (see Transcript of Record, pp. 189 to 197); thereafter an appeal from said decree was duly perfected by defendant, and the said cause is now before this court upon said appeal.

Questions Involved.

The questions involved in this appeal, and the manner in which they are raised, are as follows:

First: Whether the motions for continuance, oral and written, made by defendant should or should not have been granted, said oral motion being raised as shown by Transcript of Record, pp. 293 to 296,

and said written motion being raised by motion in writing as shown by Transcript of Record, pp. 34 to 39;

Second: Whether or not said bill in equity is sufficient in form as constituting a bill in equity for the cancellation of certificate of citizenship, that is to say, whether the facts alleged in said bill, if true, are sufficient to authorize or justify the court in cancelling certificate of citizenship, this question being raised by demurrer of defendant interposed to said bill (see Transcript of Record, p. 22 and pp. 249 to 253);

Third: Whether the proof adduced in support of said bill in equity is or is not sufficient to authorize or justify the court in cancelling said certificate of citizenship, this question being raised by the transcript of testimony herein and the specifications of error hereinafter described.

Fourth: Whether it is competent to cancel and set aside a certificate of citizenship, duly and regularly issued in 1904, upon proof of subsequent conduct in 1916; in other words, whether a period of approximately 12 years is reasonable or unreasonable in which to apply a presumption of continued existence retroactively.

Fifth: Whether the "fraud" described in section 15 of the Uniform Naturalization Act, so-called, means fraud practiced at the time of taking the oath of allegiance and procuring the certificate of citizenship, or means fraud subsequently arising.

Specifications of Error are Relied Upon.

The errors relied upon by the appellant are specifically set forth in the assignment of errors herein (see Transcript of Record, pp. 208 to 213) and are as follows:

1. The court erred in entering a final decree against the defendant-appellant and in favor of the plaintiff-appellee in this suit.

2. The court erred in finding and holding in favor of the plaintiff-appellee and against the defendant-appellant, because said holding and finding was and is contrary to the evidence and the weight of the evidence, and because there was a failure to prove the material allegations of the petition for cancellation of citizenship certificate in this suit.

3. The court erred in making, rendering and entering the final decree in said suit upon the findings and records therein.

4. The court erred in rendering and making its decree in said suit because said decree was and is contrary to all the evidence adduced in this suit, the preponderance of the evidence and the weight of the evidence, and is contrary to law and justice and to the facts and circumstances as stated and shown in the pleadings and records in said suit.

5. The court erred in finding for the United States of America, plaintiff-appellee herein, and against Frank H. Schurmann, defendant-appellant herein.

6. The court erred in holding petition for cancellation of citizenship certificate in this suit sufficient.

7. The court erred in holding that the petition for cancellation of citizenship certificate, alleging in substance insincerity in professed renunciation of former allegiance in taking oath to procure such certificate, charges fraud authorizing cancellation.

8. The court erred in holding that publication of propaganda in the United States in favor of Germany prior to the entry of the United States into the war is evidence of allegiance to Germany on the part of one formerly a subject of the Kaiser.

9. The court erred in holding that the desire to circulate propaganda in the United States in favor of Germany after the United States and Germany were at war is evidence of allegiance to Germany on the part of one formerly a subject of the Kaiser.

10. The court erred in holding that renunciation of allegiance not made absolutely and in good faith is warranted by the subsequent recognition of such allegiance.

11. The court erred in overruling the demurrer of defendant-appellant to the effect that statements made by him in the year 1918 do not and cannot constitute a ground for cancelling citizenship procured in 1904.

12. The court erred in overruling the demurrer of defendant-appellant to the petition for cancellation of citizenship certificate, said demurrer being on the ground that the said petition was insufficient

in that the same did not and does not contain any charge or allegation of fraud, express or implied, existing at the time of the procurement of such citizenship certificate.

13. The court erred in finding that upon the evidence adduced on the trial of this suit defendant-appellant, at the time he made the oath of allegiance described in the opinion and decree herein, falsely and fraudulenty made oath that he absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government, and William II, German Emperor.

14. The court erred in finding that upon the evidence adduced on the trial of this suit defendant-appellant, did not, at the time of taking and making the oath of allegiance described in this cause, in truth and in fact at such time and place absolutely and entirely abjure and renounce all allegiance and fidelity to the Imperial German Government, and William II, German Emperor, and in finding that said defendant-appellant did then and there fraudulently reserve and keep his allegiance and fidelity to the Imperial German Government and to William II, German Emperor, and did remain under and bound by it and to it.

15. The court erred in overruling defendant's oral motion for a continuance.

16. The court erred in overruling defendant's written motion for a continuance.

17. The court erred in refusing permission and motion of defendant-appellant to withdraw purported appearance and answer filed by said defendant-appellant and dated October 25, 1918, and to file in lieu thereof a new answer to be filed within one hour of the time of making such request.

18. The court erred in overruling the motion of defendant-appellant to strike all of the evidence in this suit of the witnesses Holliday, Beaseley, Ludwig, and Allen, said motion being based upon the grounds, among others: (1) that the bill in equity in this suit to cancel certificate of citizenship was based upon the affidavit of one Jeanette Ryan, nee Mrs. John Ryan, whereas said Jeanette Ryan, nee Mrs. John Ryan, was not called by the plaintiff-appellee as a witness in this suit; and (2) this being an action founded upon fraud, the circumstances of the fraud must have been first set forth in the petition in this suit to entitle proof thereof.

19. The court erred in admitting in evidence "Government's Exhibit B" over the objections of defendant-appellant as follows: that the book was written and printed before the United States went into the war with Germany and has no bearing on the case whatever; that defendant-appellant was given authority by Congress to issue said book, having been granted a copyright therefor.

("Government's Exhibit B", referred to in Assignment of Error No. 19, is too long to quote here in full, and, moreover this is deemed unnecessary.)

Argument.

The record shows (commencing see Transcript of Record, pp. 313 to 336); that the appellant in this case was born in Germany, leaving that country when about the age of twenty years and going to Australia, and thence to the United States, landing at the port of San Francisco, appellant assigning as his reason for changing his domicile that he had come in contact with people who had lived in the United States and had thereby become imbued with the American feeling of freedom as contradistinguished from the feeling in Germany, as, for instance, concerning conscription and other great restrictions in many ways, and that he has not at any time been in accord or sympathy with the ideas of Prussian autocracy (see Transcript of Record, pp. 314 to 315, 330 to 331); that from San Francisco appellant went to the City of Chicago and there entered the National Medical University, from whence he went to and attended Union College of Osteopathy at Cleveland, Ohio, returning thereafter to Chicago and attending the Northern Illinois College of Opthomology and Otology, and then became a Professor in the Chicago Golden Cross Eye, Ear and Nose Clinic; thence going to Los Angeles and occupying the chair of Optometry in the Pacific School of Osteopathy. That appellant was married for the first time in Australia, his wife being an Irish woman who bore him four children; that after her death appellant was again married, in the State of California, to an American

woman born in America, whose parents, of German descent, were also American, born in America (see Transcript of Record, pp. 316 to 317); that since appellant arrived in the United States he never at any time returned to Germany; that after the declaration of war by the United States of America on the Empire of Germany, appellant joined the Red Cross, and both he and his children bought Liberty Bonds, War Savings Stamps, and Thrift Stamps (see Transcript of Record, pp. 285, 287, 321 to 323); that he has eight children living; that two of his daughters were married to American Army officers from his house and with his sanction, and another daughter had married an American of Irish descent who offered his services to America but was rejected on account of his age (see Transcript of Record, pp. 321 to 322); that appellant himself tendered his services to the Red Cross of the United States, and that his fourteen year old son, an active Boy Scout for several years, encouraged by him, won a medal of merit and attained a second lieutenantship by doing hard work for the government in the reserve force and otherwise (see Transcript of Record, pp. 322 to 323).

Appellant was naturalized as an American citizen on December 17, 1904, in Los Angeles, and his certificate of citizenship was by the decree appealed from set aside and cancelled on the following grounds: that appellant was the author of a certain booklet published in the year 1916, entitled "The War as Seen Thru German Eyes" (Government's

Exhibit B, see Transcript of Record, pp. 44 to 187), and that in the years 1916-17-18, appellant made to several persons remarks claimed to be detrimental to the United States.

Not a word of complaint is made concerning any act of appellant prior to 1916, either at the time of his naturalization in 1904 or at any subsequent time, save only what is now claimed to have been his inward intent, or insincerity, in his renunciation of allegiance in 1904, and this is attempted to be proved solely and entirely by conduct in 1916 and later. It affirmatively appears that he has in the meantime led an exemplary life and conducted his profession and affairs in an honorable manner. He has twice married, has children by both wives, and is properly educating them and bringing them up as loyal American citizens.

The booklet published in 1916 may at once be dismissed from consideration, for, though it contains expressions with which most of us are not in accord, it must be viewed from the standpoint of the time when it was published, when every citizen had the right to freely speak, write and publish his opinions as to the cause of the European war and the justice or injustice of the European nations engaged therein. Such parts of it as comment on the attitude of our government constitute, at most, criticism of acts of public officials, which he, like every other citizen, had the absolute right to freely speak, write and publish.

The only other evidence against him is the testimony as to oral declarations alleged to have been subsequently made by him, which are claimed to indicate disloyalty. These constitute for the most part nothing more than expressions of opinion as to the probabilities of success of one or the other of the belligerents. He positively denies having made the statements attributed to him. In addition to giving due consideration to the well known rule that testimony as to oral statements are to be received with caution, we must bear in mind the fact that appellant's joining the Red Cross, purchasing Liberty Bonds and War Savings and Thrift Stamps, that none of his children speak German, that two of his daughters, with his sanction, married American Army officers, and that his fourteen year old son, encouraged by him, won a medal of merit and attained a second lieutenantship in Boy Scout and reserve force work bespeak for him a loyalty far greater than can be overcome by dubious testimony of alleged oral statements. Stating this more tersley, facts speak louder than words.

It would solve no useful purpose to unduly lengthen this brief with a discussion of the testimony. This is, therefore, left for the calm consideration of the court, and we will ask the court, in weighing the probabilities, to give due consideration to the differences of opinion and the unsettled conditions existing at the time the remarks are alleged to have been made.

The Law.

Discussion of the law side of this appeal almost necessarily requires the concession (of course for the purpose of argument only) that the testimony as to the alleged oral statements of appellant is true. This discussion easily, and it may be said automatically, divides itself into three main portions:

1. Whether the bill in this case, charging fraud in general terms, is sufficient;

2. Whether the fraud contemplated by section 15 of the Naturalization Act, in its provision for the cancellation of certificates of naturalization procured by fraud, means fraud practiced at the time and in or for the act of procuring the certificate of citizenship, or means fraud committed many years later.

3. Whether fraud at the time can be presumed solely from acts committed many years later, or stating the proposition more closely as related to the facts of this case, whether proof that a naturalized citizen gives vent, in 1916, to expressions of sympathy for the country of his birth relates retroactively so as of itself to create a presumption that he committed fraud in obtaining his certificate of naturalization in 1904, twelve years previously, or, putting the question more tersely, whether a presumption of continued existence, even if it could be said that one rises out of such subsequent conduct, runs backward.

NATURALIZATION IS A FINAL JUDGMENT.

In considering these propositions we must always bear in mind the fact that proceedings for naturalization are conducted in Courts of Record, and that the decree of naturalization is in effect a judgment of like dignity and bearing like finality and conclusiveness as any other judgment of a court of record having jurisdiction.

Spratt v. Spratt, 4 Peters, 393;
Stark v. Chesapeake I. Co., 7 Cranch 420;
U. S. v. Aakervik, 180 Fed. 137;
Ex p. Cregg, 6 Fed. Cas. 796, Fed. Case 3380;
In re McCoppin, 15 Fed. Cas. 1300, Fed. Case 8713;
Dolan v. U. S., 133 Fed. 440, 449.

It has also been uniformly held that a judgment will not be set aside for perjury or misrepresentation in its procurement.

U. S. v. Throckmorton, 98 U. S. 61;
U. S. v. Gleason, 90 Fed. 778;
Tinn v. U. S. Dist. Atty., 148 Cal. 773;
Hanley v. Hanley, 114 Cal. 690.

In this last case it was held that a decree allotting a homestead to the widow will not be set aside on the ground that she falsely represented to the court that it was community property and that she was living with her husband at the time of his death, and this, notwithstanding that appellants had no notice of the proceedings to set aside the homestead and that they were practically *ex parte.*

The basis of this doctrine, as is well known, is that there must be some finality to litigation, and therefore the court will not retry an issue that has once been tried and become final. The exception to this rule is where the judgment has been procured by some fraud extrinsic or collateral to the issue that was adjudicated; as, for instance, where a party by fictitious negotiations for compromise or false statements of the day set for hearing was prevented from defending and there was thus, by means of the fraud, created a position in which there was practically no adversary.

U. S. v. Throckmorton, supra.

We are not unmindful of the fact that this rule has been somewhat modified by section 15 of the naturalization act, providing that naturalization procured illegally or by fraud may be canceled by means of suit in equity brought by the District Attorney.

Oehlert v. Oehlert (Mass.), 124 N. E. 249;
Johannessen v. U. S., 225 U. S. 227.

But, as shown by this latter case, when the decree of naturalization is attacked for fraud, such fraud must be committed in the very act of procuring the naturalization, and the court must have been imposed upon as to a direct essential question of fact. This latter case was heard on demurrer to the amended petition, which demurrer was overruled. No answer was filed, and decree canceling citizenship followed, from which the respondent ap-

pealed. The amended petition alleged that the decree of naturalization had been procured by fraud, in this, that, although the petition for naturalization was filed less than four years after respondent's first arrival in this country, he and his witnesses falsely testified that respondent had resided more than five years in the United States, which falsity was not discovered by the United States until eight years later, when respondent voluntarily made an affidavit wherein he admitted that the certificate of naturalization had been illegally procured in that he had not been a resident of this country for the requisite five years. That case is a good example of the cases this enactment was intended to reach. Here was a person who, not having resided here the requisite five years, was wholly ineligible for citizenship, and who yet, by fraud and perjury, procured a decree of naturalization. And this was accomplished by the false statement of a physical fact, and, moreover, such perjury and falsity were brazenly admitted, both by respondent's own affidavit and by his failure to answer the petition upon the overruling of his demurrer. Such a situation is wholly unlike the case at bar, where there is no charge whatever as to any fraud in the proceedings or misrepresentation as to any matter of fact, where there is nothing more than a bare averment as to appellant's inward intention in 1904 in taking the oath of allegiance, and this inward intention is attempted to be proven solely by conduct twelve to fourteen years later.

THERE IS NO FRAUD CHARGED IN THE BILL.

The bill alleges in substance as follows: That appellant is a resident of Honolulu, Hawaii; prior to December 17, 1904, he was a subject of the Imperial German Government, and of William II, German Emperor; that on December 17, 1904, in the State of California, County of Los Angeles, appellant became a citizen of the United States by naturalization, a certificate of citizenship being issued and delivered to him (see Transcript of Record, pp. 9 to 13); prior thereto the affidavit referred to in the Naturalization Act was duly signed and sworn to, etc.; that appellant made the oath by law required to obtain the citizenship certificate, and that said certificate of citizenship was procured by fraud, in that at the time that appellant took the oath of allegiance he falsely and fraudulently made oath that he absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatsoever etc., and that in fact he did not absolutely renounce and abjure all or any allegiance and fidelity, but did then and there fraudulently reserve and keep in whole or in part his allegiance and fidelity to the Imperial German Government and to William II, German Emperor. It is observable that the bill in equity contains allegations which are general in character and that no specific acts constituting fraud are set up or alleged.

"Facts must be shown by the bill from which the court may judge whether the decree was

fraudulently obtained and the court imposed upon."

U. S. v. Norsch, 42 Fed. 417.

The insufficiency of the petition in the case at bar is well illustrated by the case of

U. S. v. Rockteschell, 208 Fed. 530.

That case was decided by the United States Circuit Court of Appeals for the Ninth Circuit. The lower court had sustained a demurrer to the petition for cancellation of citizenship and dismissed the petition. The Government appealed. The petition alleged:

> "That the said order and certificate of citizenship was procured from said court upon the representation that said respondent had resided within the United States for the continued term of at least five years * * * whereas in truth and in fact respondent had not resided continuously in the United States for five years * * * but had resided in the United States at the times and in the manner as set forth in the affidavit annexed to this petition."

The affidavit showed physical presence in the United States for three years and absence for the greater part of the time later, he having been here only at infrequent intervals in the last two years. The court in its opinion holding the petition insufficient, says:

> "But this general averment, involving, as it does, possible inferences of law as well as general conclusions of fact, is insufficient as a charge of perjured testimony or other fact.

> The controlling question is whether respondent misrepresented or wilfully withheld from the court any of the concrete, probative facts. * * * To be sufficient, the pleading must, in harmony with the general rule of pleading fraud, point out specifically in what particular the representations were false. This the petition failed to do."

See also

20 Cyc. 96;

9 Encyc. of Pl. & Pr. 686.

The rule respecting the essentials in pleading fraud and the doctrine that the precise, even somewhat evidentiary facts showing the fraud must be definitely pleaded are so well established that it would be idle to cite more authorities to sustain a proposition which is really elementary. It thus abundantly appears that the bill is insufficient, and the demurrer thereto should have been sustained.

THERE IS NO EVIDENCE OF ANY FRAUD COMMITTED IN OR PRIOR TO THE YEAR 1904. THEREFORE THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE DECREE.

Section 15 of the Naturalization Act, providing for the cancellation of certificates of naturalization procured illegally or by fraud, contains no provision for the cancellation of such certificates by reason of acts subsequently committed, nor does it contain any provision whatever creating any presumptions from subsequent conduct, with the sole exception of the taking up, by a naturalized citizen, of a perma-

nent residence in a foreign country within five years after naturalization, which latter provision is considered at length in

Luria v. United States, 231 U. S. 9,

which case we will discuss presently The act is not punitive in character, and makes no attempt to deprive a naturalized citizen of his citizenship by reason of subsequent conduct. The act simply provides that a certificate of citizenship procured illegally or by fraud may be cancelled. This, as already demonstrated, means fraud committed at or prior to the time of naturalization and in the very act of procuring the certificate. Just like any other question of fact in issue,

SUCH FRAUD MUST BE PROVEN BY COMPETENT TESTIMONY ACCORDING TO THE ESTABLISHED RULES OF EVIDENCE.

No such evidence has been presented in the case at bar. The District Attorney has not presented an iota of evidence as to any fact whatever prior to 1916 except the issuance of the certificate of citizenship in 1904, which, of course, bears with it the attendant presumptions of validity. No attempt whatever has been made to prove the fraud alleged to have been committed in 1904, except only by utterances, claimed to be disloyal, alleged to have been made in 1916 and later. It must already be obvious to this court that there is no evidence in the record sufficient to sustain the decree.

But it attempted to sustain the decree by the novel theory that appellant's intent in 1904, when

he procured his certificate of citizenship, may be shown by evidence of his conduct twelve years later, or, stating the proposition in another form, that the existence of a thing today proves its existence twelve years ago. This, it will be noticed, is a complete reversal of the doctrine that a thing proven to exist continues to exist as long as is usual with things of that nature, which is a presumption of future continued existence. But here we have an attempt to make a presumption of continued existence run backward. And we must not for a moment lose sight of the fact that no such presumption is created or attempted to be created by the act. On the contrary, such backward or reverse presumption is attempted to be created solely by judicial decision, without any authority whatever to support it, save only a decision of a *nisi prius* court of co-ordinate jurisdiction, in the case of United States v. Wursterbarth, 249 Fed. 908, to which we shall presently give our attention. We are not unmindful of the case of United States v. Darmer, 249 Fed. 989, also by a *nisi prius* court, cited by the learned judge in his opinion, but this case, as we will presently show, states a rule of pleading, and not of evidence.

With but these two cases as authority it is attempted to overturn the long established rules of evidence and, through a complete reversal of established doctrines, to prove the existence, in 1904, of a state of mind by proof of conduct twelve or more years later, under far different circumstances.

And the District Attorney will no doubt term this due process of law.

If authority were needed to refute such an astounding proposition, it can be furnished in abundance. In

Ellis v. State, 138 Wis. 513,

arising by virtue of a writ of error to the Circuit Court to review a conviction of the offense of receiving money into a bank for the credit of a depositor with knowledge or good reason to know (a state of mind, as in the case at bar) that the bank was unsafe or insolvent, Justice Marshall, rendering the decision, says:

> "It is an elemental principle of evidence that as a general rule presumptions do not run backward; that while 'when the existence of a person, a personal relation, or a state of things is once established by proof, the law presumes that the person [personal] relation or state of things continues to exist as before until the contrary is shown or until a different presumption is raised from the nature of the subject in question' (State *ex rel.* Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500; Greenl. on Evidence, § 41) *there is no retroactive evidentiary inference, especially reaching backward materially.* So, proof of insanity or insolvency at a particular time is not competent to prove, on the principle of natural and probable relation, the same condition a considerable period prior thereto." (Italics ours.)

With what greater force this principle is applicable to a state of mind, thought or sympathy needs nothing more than to be suggested.

Similar doctrine is enunciated in

1 Greenleaf on Evidence, section 41.

That the existence of this doctrine is recognized by the Congress is demonstrated by the provision, in the second paragraph of section 15 of the Naturalization Act, providing that the taking up, within five years after naturalization, of a permanent residence in a foreign country is presumptive evidence of an absence of intention at the time of naturalization to reside in the United States. This provision creates a statutory presumption, so created by positive, statutory enactment. It will scarcely be contended that, in the absence of any such statutory provision, absence of intent at the time of naturalization to reside in the United States could under the existing rules of evidence be presumed from subsequent departure. If such were the case, there would have been no necessity for this express legislation. Let us not forget that there is no such provision in any way applicable to the case at bar. The above provision, as already suggested, is discussed in the Luria case, supra.

In that case it appears that the appellant obtained his certificate of citizenship in July, 1894. *In the following month* he sought and obtained a passport to go to South Africa, and in the following November he left the United States for Transvaal. From that time to the date of the hearing, in December, 1910, he resided and practiced his profession in South Africa, joined the South African Medical Association and served in the Boer war, and in a short

visit to this country he gave his address as Johannesburg, South Africa. He was not present at the hearing, and, although there was ample time to take his deposition, it was not taken, and there was no attempt to explain his removal to the Transvaal so soon after he procured his certificate of citizenship. The validity of the statute creating the presumption of lack of intention to reside permanently in the United States was drawn in question. In its discussion the court, upholding the reasonableness of an enactment creating a presumption of lack of intent to permanently reside in the United States from the fact of taking up a permanent residence in a foreign country *shortly* following naturalization, says (p. 27):

> "No doubt the reason for the presumption lessens as the period of time between the two events is lengthened. But it is difficult to say at what point the reason so far disappears as to afford no reasonable basis for the presumption. Congress has indicated its opinion that the intervening period may be as much as five years, without rendering the presumption baseless. *That period seems long* and yet we are not prepared to pronounce it certainly excessive or unreasonable. But we are of opinion that as the intervening time approaches five years the presumption necessarily must weaken to such a degree as to require but slight countervailing evidence to overcome it. On the other hand, when the intervening time is so short as it is shown to have been in the present case, the presumption cannot be regarded as yielding to anything short of a substantial and convincing explanation. So construed, we think the provision is not in excess of the power of Congress." (Italics ours.)

That case discloses a presumption of evidence established by legislative enactment as a part of the substantive law of the land; in the case at bar we have a case where a presumption of evidence is laid down by a trial court without statutory authority; in the Luria case, the period established by law is five years; in the case at bar, we have a court holding a judicial presumption of evidence retroactive to the extent of twelve years; in the Luria case, notwithstanding the fact that Congress established a presumption as a part of substantive law,—notwithstanding that the presumption arises by virtue of the will of the people expressed through their accredited representatives,—yet the highest and most supreme tribunal of justice in the United States (and perhaps in the whole world) indicated that the period established—five years—is unreasonable; in the case at bar, the trial judge decides as a judicially created rule of evidence that a period of twelve years is not unreasonable; in the Luria case, there was an absolute unequivocal act; in the case at bar there was none; in the Luria case, the alien receiving the certificate of citizenship was expressly forbidden by law, under penalty of loss of citizenship, from departing from the United States within the designated period; in the case at bar there was no such inhibition. Notwithstanding that by the direct enactment of statute the Congress has created a presumption of absence of intent to reside in the United States arising from departure within five years, yet the Supreme Court holds that as the in-

tervening time approaches five years the presumption necessarily must weaken to such a degree as to require but slight countervailing evidence to overcome it. What, then, must become of such a presumption *after* the lapse of five years, even when enacted by statute? And how, in the face of this decision, can it possibly be claimed that such a presumption can at all exist under the established rules of evidence, without such statutory enactment, and especially after the lapse of twelve years?

CASES CONTRA.

The learned trial judge, in his opinion (Transcript pp. 189-197) cites the case of United States v. Wursterbarth, *supra,* which, as above stated, is a decision by a *nisi prius* court, and in which the court itself, in its opinion, says that

> "the case is one of first impression, as far as I am informed or have been able to ascertain".

There it appears that the respondent upon being requested to contribute to the Red Cross, became angry and said that he would do nothing to injure the country in which he had been born, brought up and educated, would give no money to send soldiers to the country where he was born and educated and that the solicitor did not know what it meant to be born in a country and then have men go over and fight against that country; said further that he would do nothing to help defeat Germany and did not want

America to win the war, that he had relatives in Germany, *and that he only came to this country on a vacation or visit.* It further appears that the respondent *did not attempt to refute or explain any of that testimony.* The court there pertinently says:

> "If the respondent's present state of mind was different from what it was when naturalized, or if the expressions which he used did not properly express his feeling, an opportunity was afforded him to have so demonstrated. He did not attempt to explain or deny; his attitude was rather one of defiance. * * * The burden should be cast on the respondent to dispel the doubt. He, as no one else, has the means of doing so."

Concerning the presumption, the court says (p. 910):

> "It is argued that it is not legitimate to presume that his (respondent's) mental attitude today is the same as it was thirty-five years ago, and as a general rule presumptions do not 'run backwards'. I will readily concede that proposition."

Yet the court, after practically conceding that the decision ought to be in favor of the respondent, proceeds to decide the other way. No appeal was taken, hence there was no opportunity for review by an appellate court. The decision was no doubt influenced by the respondent's own defiance and his wilful failure to deny or explain the statements attributed to him, or even to explain his former state of mind or intention. How different is the present case, where the defendant not only denied

the statements attributed to him, but testified (Tr. p. 287):

> "When I made said oath [on obtaining certificate of naturalization] I meant every word and syllable of it, and do so now, and I have shown by my acts and actions that I have always meant every word and syllable of that oath * * * Having renounced fidelity to Germany and sworn allegiance to America I was ready to aid in every respect, and I am ready now, if it comes to the test, to go and help honestly in every respect." Similar expressions on p. 288.

And how different is the present case, where defendant did subscribe, not only to the Red Cross, but also to Liberty Bonds and War Savings Stamps, urged his children to uphold and work for the flag, encouraged his son in Boy Scout and Reserve Force work, and where his children do not even speak a word of German, his family, home and household being thoroughly American.

The other case cited by the trial court, United States v. Darmer, *supra,* was, as above suggested, a decision on pleading, rendered on motion to dismiss, also by the trial court. The petition, after pleading the oath of allegiance and the fraudulent mental reservation, proceeds with allegations, somewhat evidentiary in their nature, but nevertheless necessary in pleading fraud to sustain this ultimate allegation, of respondent's refusal to buy Liberty Bonds because, as he said, it would be like kicking his own mother, and that he would rather throw all his property into the bay than buy one $50 Lib-

erty Bond. This petition is an illustration of what the petition in the case at bar should have contained. The court pertinently says:

> "Whether the feeling expressed existed in a stronger or weaker state, or at all, in 1888, cannot be determined merely from the allegations of the complaint. *Evidence alone can establish that.*" (Italics ours.)

Which latter expression makes this really a decision in our favor, for it plainly means that, in order to prove the alleged mental reservation pleaded, evidence must be produced showing that the feeling did exist, in a stronger or weaker state, or at all, at the time of naturalization.

It will be claimed, and it may be conceded, that the title to citizenship does not confer a vested property right but is a mere privilege capable of being revoked by the power that granted it. Still it must not be forgotten that this power of revocation is lodged in the people acting through their representatives in Congress, who as such representatives by legislative enactment have prescribed the definite and specific grounds for such revocation and the manner in which such grounds must be proven, that such power of revocation is not a matter of discretion lodged in any court, but may be exercised only through a solemn judicial proceeding after due proof, in a tribunal of justice according to due forms of law, of a ground for revocation thus specified by legislative enactment; that the law gains its respect only from a calm, just and impartial admin-

istration thereof, and, moreover, that trial judges should proceed with extreme caution in any attempt to establish new and hitherto unknown rules of evidence to fit a particular case, contrary to principles of substantive law which have been in existence for centuries, formulated into their present state af perfection through long years of experience. *"Fiat Justitia, Ruat Coelum."*

CONCLUSION.

The principle that presumptions of continued existence do not run backwards, so to speak, is so thoroughly established and interwoven into the fabric of our jurisprudence, that it would seem an insult to the intelligence of the judges of the court hearing this appeal to multiply authorities. In conclusion, therefore, it is respectfully submitted that the decree appealed from ought to be reversed and the petition ordered to be dismissed.

Respectfully submitted,

C. H. McBride,

Attorney for Appellant.

S. Joseph Theisen,

Of Counsel.

No. 3[illegible]

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

FRANK H. SCHURMANN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District and Territory of Hawaii.

BRIEF FOR THE UNITED STATES.

ANNETTE ABBOTT ADAMS,
United States Attorney.

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No. 3422

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK H. SCHURMANN,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF THE CASE.

This is an appeal from the decree of the District Court for the District and Territory of Hawaii cancelling the certificate of naturalization of Frank H. Schurmann, who prosecutes this appeal alleging error in nineteen particulars (Tr. pp. 108-112); however, the brief of appellant seems to rely principally upon three points: (1) Finality of the judgment of naturalization; (2) Insufficiency of the Bill to charge fraud and (3) Insufficiency of evidence to sustain charge of fraud.

The material allegation of the complaint is as follows:

"Sixth. That the said certificate of citizenship that was then and there issued to respondent as aforesaid was procured by respondent by fraud, in this: That at the time respondent made the oath of allegiance referred to in the next preceding paragraph, he falsely and fraudulently made oath that he absolutely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government and William II, German Emperor; complainant alleges that the respondent did not at such time and place absolutely and entirely abjure and renounce all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the Imperial German Government and William II, German Emperor, but did then and there fraudulently reserve and keep in whole, or in part, his allegiance and fidelity to the Imperial German Government, and to William II, German Emperor." (Tr. p. 11.)

The procedure for cancellation of a certificate of naturalization fraudulently or illegally obtained is as follows:

"It shall be the duty of the United States District Attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizen-

ship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

"* * * The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any Court exercising jurisdiction in naturalization proceedings under prior laws." (June 29, 1906, c. 3592. Sec. 15, 34 Stat. 601.)

SECTION 15 OF THE NATURALIZATION ACT PROVIDES FOR A TEST OF THE RIGHT TO THE PRIVILEGE OF CITIZENSHIP.

Preliminary to taking up the points contended for by appellant's counsel, we would respectfully direct attention to the general nature of the proceedings by which Dr. Schurmann's certificate of naturalization was cancelled.

They are proceedings which do not necessarily infer moral turpitude, although we may maintain the opinion that one who exercised fraud upon a Court of Justice is in a degree guilty of moral

turpitude; however, these proceedings are in no respect criminal in their nature. All that was sought and accomplished by the proceedings before the District Court was to take from Dr. Schurmann the privilege which had been improperly granted to him when the Court discovered that it had been so improperly granted.

As set out in the case of *Johannessen* v. *U. S.*, 225 U. S. 227; 56 L. Ed. 1066 at 1071, quoting Judge Cross in *U. S.* v. *Spohrer,* 175 Fed. 440.

> " 'An alien friend is offered, under certain conditions, the privilege of citizenship. He may accept the offer and become a citizen upon compliance with the prescribed conditions, but not otherwise. His claim is of favor, not of right. He can only become a citizen upon and after a strict compliance with the Acts of Congress. An applicant for this high privilege is bound, therefore, to conform to the terms upon which alone the right he seeks can be conferred. It is his province, and he is bound, to see that the jurisdictional facts upon which the grant is predicated actually exist, and if they do not he takes nothing by his paper grant. Fraud cannot be substituted for facts.' And again, at p. 446: 'That the Government, especially when thereunto authorized by Congress, has the right to recall whatever of property has been taken from it by fraud, is in my judgment well settled; and, if that be true of property, then by analogy and with greater reason, it would seem to be true where it has conferred a privilege in answer to the prayer of an *ex parte* petitioner.' "

CONCEDING NATURALIZATION TO BE A FINAL JUDGMENT SECTION 15 OF THE NATURALIZATION ACT OF JUNE 29, 1906, IS SUFFICIENT AUTHORITY FOR THE COURT TO CANCEL CERTIFICATE OF NATURALIZATION.

In *U. S.* v. *Ness,* 245, U. S. 319, 62 L. ed 321 at 324.

A court propounded the following question:

> "Whether an order entered in a proceeding to which the United States became a party under Section 11 is *res judicata* as to matters actually litigated therein so that the Certificate of Naturalization cannot be set aside under Section 15, as being 'illegally' procured."

In this case the United States had entered its appearance under section 11 of the Naturalization Act in opposition to the granting of naturalization and submitted a motion that the petition be dismissed on the ground that the Certificate of Arrival was not attached. This motion was denied and the order denying it sustained by the Circuit Court of Appeals for the 8th circuit. The Supreme Court in discussing the question thus propounded by it stated:

> "A decision on such minor questions, at least of a state court of naturalization, is, though, clearly erroneous, conclusive even as against the United States if it entered an appearance under Section 11. For Congress did not see fit to provide for a direct review by writ of error

or appeal. But where fraud or illegality is charged, the act affords, under Section 15, a remedy by an independent suit "in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit."

"Section 11, unlike section 15, does not specifically provide that action thereunder shall be taken by the United States district attorneys; and if appearance under section 11 on behalf of the Government should be held to create an estoppel, no good reason appears why it should not arise equally whether the appearance is by the duly authorized examiner or by the United States attorney. But in our opinion section 11 and section 15 were designed to afford cumulative protection against fraudulent or illegal naturalization. The decision of the Circuit Court of Appeals is therefore reversed."

That the act is constitutional and valid even in its retrospective operation seems to have been amply decided.

In *Luria* v. *U. S.* 231, U. S. 9; 58 L. Ed. 101, at page 106, the Court said:

"Perceiving nothing in the prior laws which shows that Congress could not have intended that the last paragraph of Sec. 15 of the Act of 1906 should be taken according to the natural meaning and import of its words, we think, as before indicated, that it must be regarded as extending the preceding paragraphs of that section to all certificates of naturalization, whether secured theretofore under prior laws, or thereafter under that act."

See also *U. S.* v. *Mansour,* 170 Fed. 671, *Johannessen* v *U. S.,* 225 U. S. 227; 56 L. Ed. 1066 at 1070.

FRAUD IS SUFFICIENTLY SET FORTH AND ALLEGED IN THE BILL.

The fact alleged in the bill, to-wit:

That while appellant swore that he renounced and abjured allegiance to the German Emperor, he did in truth reserve and keep allegiance and fidelity to the German Emperor—is a fact which may be established by competent evidence.

It is conceded that facts must be shown by the bill sufficient to enable the Court to judge whether or not the certificate was fraudulently obtained, but it does appear quite sufficient that the certificate has been fraudulently obtained if when appellant appeared before the Court and used words indicating that he forswore his allegiance to every foreign potentate, he at the same time fraudulently reserved and kept his allegiance and fidelity to such a foreign potentate. For by that act he committed a fraud upon the court in the very matter essential to his admission to citizenship and without which he would not have been entitled to a certificate of naturalization. That he falsely reserved his allegiance is the fact in issue and a sufficient fact for

the Court to have refused the issuance of a certificate had it been known. Not only his negativing of allegiance to the German Emperor, but also his affirmation of allegiance to the United States were as conditions precedent to the issuance of the certificate of naturalization.

> *U. S.* v. *Spohrer,* 175 Feb. 440,
> *Johannessen v U. S.,* 225 U. S. 225; 56 L. Ed. 1066.

The Naturalization Act, Section 15, provides for the instituting of proceedings by the United States District Attorney "upon affidavit showing good cause therefor." Good cause is sufficiently set forth by the affidavit of Jeannette Ryan attached to the Bill. (Tr. pp. 13-20.)

In *U. S.* v. *Daimer,* 249 Fed. 989, at p. 990, Judge Ashmann said:

> "The showing of the affidavit is held to warrant the District Attorney, in the exercise of his discretion, in bringing the suit. The allegations charging the defendant with falsely taking an oath renouncing his allegiance to Germany and the German Emperor by means of which false oath defendant secured his certificate of naturalization, are sufficient as against a demurrer or motion to dismiss."

The Circuit Court of Appeals in *U. S.* v *Salomon,* 231 Fed. 928, while holding the affidavit of good cause insufficient, suggests that setting forth a fact

upon which a certificate of citizenship might have been denied, would have been sufficient.

Moreover, doubts as to whether or not conditions required by statutes for admission to citizenship have been performed, should be resolved in favor of the Government.

U. S. v. *Griminger,* 236 Fed. 285.

In *U. S.* v. *Ginsberg,* 243 U. S. 472; 61 L. Ed. 853, at 856, Mr. Justice McReynold delivering the opinion, said:

> "No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it, as provided in Sec. 15, and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact, it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence non-essential."

And it would seem to us no different if the "manifest mistake" was caused by the fraud of the petitioner.

THERE IS EVIDENCE OF FRAUD COMMITTED BY APPELLANT AT THE TIME OF THE ISSUANCE OF THE CERTIFICATE OF NATURALIZATION SUFFICIENT TO SUSTAIN THE COURT'S DECREE.

The main contention of counsel for appellant appears to be that since evidence of the fraud alleged to have been committed in 1904 was not disclosed or discovered until 1916, that such evidence may not be taken to establish condition of mind existing at that time.

The acts of appellant proved to have been committed in the years from 1914 to 1917 and even up to the time that the bill was lodged against him in May, 1918, cannot be taken but showing a clear allegiance to the German Emperor, and a want of allegiance to the Government of the United States of America.

It should be enough to refer to the fact that Dr. Schurmann the appellant. takes full responsibility for the book "The War as seen through German Eyes," as a "brief and sincere expression of my feelings and opinions, together with indisputable 'facts' regarding the great international struggle now going on in Europe." (Tr. p. 50) that he admits that the book was intended as propaganda (Tr. pp. 291, 292); although he attempts to argue that such propaganda was merely to keep the United States out of war and circulated before this nation was at war, yet he sought permission to distribute copies of the book subsequent to declaration of war by the United States on Germany (Tr.

pp. 261, 262); that he offered copies of the book to be read after the United States had entered the war (Tr. p. 268); that he likened change of allegiance to a country to a change of taste for a good cigar (Tr. p. 251), and that while the country was at war he was planning in his mind how he might avoid passport requirements and reach Germany through Mexico (Tr. p. 283).

As said by the Court in opinion (Tr. pp. 193-196):

"But in view of the mass of evidence of his disloyalty appearing in a certain book written and published by him in August, 1916, which has been introduced in evidence, it is really unnecessary to notice the evidence of oral expressions.

"The title of this book is 'The War as Seen Through German Eyes.' It is about as poisonous German propaganda as was ever fabricated. The respondent admits it was propaganda, and that it was intended to create sentiment to prevent the United States from going to war with Germany. It is a bitter denunciation of all men and nations standing in the way of German success, and a laudation of all things German. It is full of falsehoods in regard to the origin, cause and conduct of the war, and of false accusations against the allied nations and against the Government and people of the United States and the President of the United States; and the hatred exhibited in it against Great Britain and the peculiar affection displayed towards "downtrodden Ireland," are such as are rarely to be found elsewhere than in the heart of the Hun. In it respondent complains against the United States and the President, because of the sale of arms and munitions by citizens of the United States

to Great Britain and her allies, and complains against the President for "killing" the resolutions offered in Congress to warn Americans to keep off the ships of the Allies, and he justifies and applauds the murdering of 114 Americans on board the "Lusitania" when she was sunk in violation of law and in violation of the rights of every person on board. He accuses the owners of the "Lusitania" of being "guilty of this terrible calamity" because, as he charges, the (59) vessel was laden with arms and ammunitions, and they "knew the submarines would lay for her"; and he denounces the United States Government as guilty because it did not "Prevent any one from sailing on the doomed ship," and he denounces "the reckless passengers themselves, who disregarded the often repeated and earnest warnings not only published by the German authorities, but also sent by the German authorities to each of these passengers individually." But for the murderers who committed the crime he sings a hymn of praise and says he would do as they did himself if he were in command of a submarine and had the opportunity, and that he knows "you" would do so also.

Respondent said in an article published in the "Honolulu Star-Bulletin," on August 11, 1915, which he introduced in evidence, that when he learned "that Germany had declared war upon Russia," his "first thought was to serve the Fatherland," and he "went to the German Consul here and offered his services, which were accepted"; and he further said in the same article: "Plans were already begun for starting to the front when I suffered a stroke of paralysis and was rendered blind and practically unable to move." After reading this book, in the light of subsequent events, and comparing the propaganda put forth in it with other propaganda of the German Government, the evidence is very strong that respondent permitted

himself to be used as a tool by the German Government acting through its Consul in Honolulu, to disseminate its propaganda under the cloak of American citizenship, and this was the "service" to the "Fatherland" the Consul gave him to do.

It is not necessary to review the book or any of the many false charges in it against the Government and people and President of the United States. It is one hundred and forty-two pages of lying propaganda designed to stir up sentiment to embarass the Government of the United States in the conduct of our affairs with (60) Germany and to deprive the President of the United States of the support of the American people in the correct and courageous stand he had taken in defense of American rights against outrageous German aggression. It is sufficient to say that the publication of it is sufficient evidence of respondent's disloyalty to the United States and allegiance to the German Emperor.

FACTS OCCURRING AT ANY TIME MAY BE TAKEN AS EVIDENCE OF FRAUD IF FROM THEM FRAUD MAY REASONABLY BE PRESUMED.

Dr. Schurmann's allegiance, either to the German Emperor or to the United States, was a matter of fact entirely subjective at the time he was given the certificate of naturalization, and it was only when that subjective condition of his mind met with the situation that caused him to evince outwardly what it was, that we have any evidence, other than his oath of allegiance, from which might be determined what his true state of mind was and he was not entitled to remain undecided but his oath of

allegiance required that he actively participate from that moment both in the responsibilities as well as the benefits of citizenship.

It is a natural inference that the enjoyment of the benefits of citizenship for twelve years should have strengthened his allegiance so that when the test came, if he ever had the intention of supporting the constitution and laws of this Government against any foreign potentate, he would not have hesitated in giving his allegiance first and always to the United States. He took the oath of allegiance for the purpose of obtaining a privilege and the oath must have contemplated allegiance as long as the privilege lasted.

It was said in *U. S.* v. *Wurstervarth,* 249 Fed. 908:

> "If, therefore, under such circumstances, after 35 years, he now recognizes an allegiance to the sovereignty of his origin, superior to his allegiance to this country, it seems to me that it is not only permissible to infer from that fact but that the conclusion is irresistible, that at the time he took the oath of renunciation, he did so with a mental reservation as to the country of his birth, and retained towards that country an allegiance which the laws of this country required him to renounce before he could become one of its citizens. Indeed, for the reasons just stated, his allegiance to the former must at that time have been stronger than it is at present. Whatever presumption might other-

wise arise in his favor from the apparent fact that during the intervening years he has lived as a good citizen of this country is of no weight, when it is considered that nothing has happened during that time to call forth a manifestation of his reserved allegiance, and that as soon as something did happen—*i.e.,* the war between this country and Germany—he immediately manifested it."

It is argued that it is not legitimate to presume that his mental attitude today is the same as it was 35 years ago, because as a general rule presumptions do not "run backwards." I will readily concede that proposition. However, without attempting to differentiate, if indeed there is any real distinction, between a strictly legal presumption of fact, which constitutes at least *prima facie* proof of a matter on controversy, and the probative value of one circumstance in establishing another fact, there are many cases in which it is permissible to infer the existence of one fact from proof of subsequent facts. If the natural and probable inference to be drawn from a proven fact is the existence of another fact, it makes no difference whether the latter fact be before or after, in point of time, the fact from which the inference is to be drawn. The decisive point is whether the inference is a natural and probable one. That principle is recognized by all the authorities, and is supported by every consideration of reason. It will be sufficient, I think, to refer to the remarks of the Supreme Court in *Luria* v. *United States,* 231 U. S. 9, 27, 34 Sup. Ct. 10, 58 L. Ed. 101, where this very section of the Naturalization Act was under consideration, and *Ellis* v. *State,* 138 Wis. 513, 119 N. W. 1110, 20 L. R., A. (N.S.) 444, 131 Am. St. Rep. 1022, a case relied upon by counsel for the respondent."

The utmost good faith is required of the alien

who seeks to become a citizen and anything which shows bad faith on his part should be sufficient ground for denying him the privilege, even though discovered long after the privilege was granted.

In *U. S.* v. *Albertini,* 206 Fed. 133, a certificate of naturalization was cancelled for fraud in that the applicant swore that he was unmarried, when as a matter of fact he had deserted his family.

In *U. S.* v. *Mansour,* 170 Fed. 671, certificate was cancelled for bad faith in not intending to make the United States his home and desired citizenship for protection in a foreign country.

In *U. S.* v. *Ellis,* 185 Fed. 546, the certificate was cancelled for fraud in that the applicant did not intend to become a permanent citizen.

In *U. S.* v. *Snelgin,* 254 Fed. 884, and *U. S.* v. *Stuppiello,* 260 Fed. 483, certificate cancelled on the ground that applicants did not disclose fact that they were anarchists.

> See also *U. S.* v. *Simons,* 170 Fed. 680., and *Grahl* v. *U. S.* (C. C. of A. 7th Circuit), 261 Fed. 487.

It is respectfully submitted for the Government that Dr. Schurman violated his oath of allegiance to the United States and espoused the cause of the German Empire in such glaring manner that it is

impossible to believe otherwise than that his oath of allegiance was not made in good faith and that it would not only be a dangerous precedent to allow the granting of the privilege of citizenship to be returned to him but it would be manifestly unfair to the hosts of those of the naturalized citizens of the country who have stood the test of their allegiance and remained true to the country of their adoption in its time of trial.

Respectfully submitted,

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APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Aside from quoting the opinion of the lower court, which we shall discuss presently, and the unsupported opinion of a *nisi prius* court in the *Wursterbarth* case, which we fully answered in our opening brief (pp. 26-28), the greater portion of the District Attorney's brief is devoted to general propositions against which we have made no contentions. We have in no way disputed the duty of the District Attorney to institute proceedings for the concellation of naturalization in proper cases. Nor have we raised any question as to the constitutionality of that portion of the Act which provides for the cancellation of certificates issued before, as well as

after, the passage of the act. On the contrary, we conceded (p. 29) that a certificate of citizenship does not confer a vested property right so as to prevent the subsequent enactment of provisions for its revocation for causes existing at the time of the issuance of the certificate.

We did show, by ample authority, that the certificate of naturalization is a judgment, with its intendments of finality. We conceded (p. 15) that, as regards certificates fraudulently or illegally procured, their unimpeachability has been somewhat modified by section 15 of the Act, citing the *Johannessen* case. But we contended, and now contend, that this section cannot be extended beyond its express provisions, and that, except as thus specifically provided, the finality of a certificate of naturalization still exists with like effect as before the passage of the Act. It follows that a certificate of naturalization, once granted, cannot be canceled except for fraud or illegality in its procurement shown *by competent evidence to have existed at the time of the issuance of the certificate.*

> "The ordinary presumptions and rules of evidence are not reversed in suits to cancel certificates of citizenship."
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> *U. S. v. Deans*, 230 Fed. 957; 145 C. C. A. 151.

THE INSUFFICIENCY OF THE BILL.

The reply of the District Attorney confirms, rather than refutes, our claims as to the insufficiency

of the petition. He concedes that "*facts* must be shown in the bill sufficient to enable the court to judge whether the certificate was fraudulently obtained," and that the bill must be supported by an affidavit "showing good cause therefor." Now where are the "facts", claimed to have taken place in 1904, set forth? And where does the "good cause" appear? He overlooks the elements always essential in pleading fraud in ordinary cases, namely, that the specific facts showing fraud must be definitely pleaded. It is not sufficient to plead conclusions, as, for instance, to plead that an act was fraudulently done, or that there was lack of good faith. The precise facts must be pleaded. The Congress must be presumed to have known this elementary doctrine. Yet so careful and considerate was the Congress to guard against the harassing of our adopted citizens in times of national stress or feeling by vexatious proceedings that it required, in addition to the otherwise essential averments of specific facts, an affidavit showing "good cause". We repeat, where, aside from the averment of conclusions, are the "facts" set forth? And where is the "good cause", the fraud, existing *at the time of the issuance of the certificate,* shown? Utterly failing to aver any specific facts committed in 1904, the bill and the affidavit are clearly insufficient (*U. S. v. Norsch,* 42 Fed. 417; *U. S. v. Salomon,* 231 Fed. 928; 146 C. C. A. 124), in the latter case the court saying:

> "We think it manifest that it was intended that the required affidavit should state facts

constituting 'good cause' for instituting the proceeding."

THE INSUFFICIENCY OF THE EVIDENCE.

But let us come to the main proposition, the really decisive point, the insufficiency of the evidence to justify the decision. The District Attorney concedes that "*facts* must be shown by the bill sufficient to enable the court to judge whether or not the certificate was fraudulently obtained". It follows that such facts must also be proven, and that they must be proven by means of the established rules of evidence. Now how did the District Attorney try to prove the alleged facts, the "facts" (constituting fraud) alleged by him to have been committed in 1904, at the time of the naturalization?

He says (p. 13) that "facts occurring *at any time* may be taken as evidence of fraud if from them fraud may reasonably be presumed". With no foundation therefor other than this *ipse dixit,* he endeavors to prove the supposed "facts"—the fraud alleged to have been committed in 1904—*solely and only by means of inference* from the attempted proof of an alleged lack of allegiance to the United States claimed to exist twelve to fourteen years later, which latter condition is in turn sought to be *inferred* from proof of declarations alleged to have been made in the years 1916 to 1917. Or, reversing the operation, the District Attorney produces evidence that in the years 1916 to 1917 the appellant wrote a book and made certain oral decla-

rations of opinions as to the justice or injustice of the cause of certain of the foreign belligerents. Therefrom he seeks to draw an inference that this proves a present existing lack of allegiance to the United States; in other words, an inference that the appellant is guilty of treason to his adopted country. From this inference he seeks in turn to draw another inference, namely, that this standing by itself proves that the same condition of lack of allegiance existed twelve to fourteen years previously, and of itself proves that appellant did not then mean what he said and committed perjury in taking the oath of allegiance.

Such is the position of the District Attorney. He argues (p. 10): "The *acts* of appellant proved to have been committed in the years 1914* to 1917 * * * cannot be taken but *showing* [an inference] * * * a [now existing] want of allegiance to the United States," and from this alone, with nothing else to support it, he argues [another inference] that "it is impossible to believe otherwise than that his oath of allegiance [taken in 1904] was not made in good faith". The conclusion of the lower court is based upon similar premises.

Passing for a moment the question of the burden of proof, we will show that the attempted proof by such inferences directly violates three cardinal rules of evidence, first, that presumptions do not run back-

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*This date is erroneous. Appellant's book was published in 1916 (Tr. p. 45). This naturally aroused against him the enmity of the British colony in Honolulu (Tr. pp. 351-7) and was the commencement of his troubles.

ward; second, that an inference cannot be founded upon an inference; and third, that where inferences or presumptions conflict, the presumption of lawful intent and innocence of crime, fraud or wrong—the strongest presumption in the law—controls.

PRESUMPTIONS DO NOT RUN BACKWARD.

The District Attorney cites only the unsupported *Wursterbarth* case in support of his assertion (p. 13) that facts occurring *"at any time"* may be taken as evidence of fraud if from them fraud may reasonably be presumed. This assertion ignores two elementary principles of evidence, namely, that the facts must not be too remote, and that presumptions do not run backward. The latter of these two principles will suffice here. It also demonstrates the former. The quotation already made from *U. S. v. Deans, supra,* is especially applicable:

> "The ordinary presumptions and rules of evidence are not reversed in suits to cancel certificates of citizenship."

In *W. F. Corbin & Co. v. U. S.,* 181 Fed. 296, 104 C. C. A. 278, the court says:

> "We do not understand the rule of presumptive evidence to be that if and when the existence of a given condition is proven, there is a presumption that it had existed prior to that time. *Inhabitants of Hingham v. Inhabitants of South Scituate,* 7 Gray (Mass.) 232; *Dixon v. Dixon,* 24 N. J. Eq. 134; *Blank v. Township of Livonia,* 79 Mich. 5, 44 N. W. 157; *Manning v. Insurance Co.,* 100 U. S. 697, 25 L. Ed. 761.

> In *Inhabitants of Hingham v. Inhabitants of Scituate,* supra, Bigelow, J., speaking for the court, said * * * 'We know of no rule of law which permits us to reason in an inverse order and to draw from proof of the existence of present facts any inference or presumption that the same facts existed many years previously.' "

The opinion contains similar quotations from the *Dixon* and *Blank* cases. The Supreme Court of California, in

Windhaus v. Bootz, 92 Cal. 617, 622,

makes, with approval, the same quotation from the Massachusetts case. In *Cerruti Co. v. Simi Land Co.,* 171 Cal. 254, the same court says:

> "Plaintiff's case would seem to depend, therefore, upon a presumption that a present state of facts shown must have been in existence for a long time—a presumption which the law does not recognize. Presumptions do not run backward."

In *Estate of Dolbeer,* 149 Cal. 227, 235, *Henshaw, J.,* speaking for the same court, says:

> "Proof of insanity carries back no presumption of its past existence."

In *McDougald v. S. P. R. Co.,* 9 Cal. App. 236, the court holds that the presumption of continuance of things or conditions shown to exist is "prospective and not retrospective".

It is thus abundantly shown that there is no warrant whatever for the assertion of the District Attorney, or the conclusion of the lower court, that facts occurring "at any time" may be taken as evi-

dence of fraud or that lack of good faith (denominated fraud) in taking the oath of allegiance in 1904 may be inferred from expressions of opinion uttered twelve to fourteen years later. If judgments of courts of justice could be pronounced upon such mere conjectures, what would become of the safeguards which long years of experience have formulated for the protection of civil rights and the orderly administration of justice?

AN INFERENCE CANNOT BE FOUNDED UPON AN INFERENCE.

We have shown that from declarations alleged to have been made in 1916 to 1917 the court *inferred* a then existing lack of allegiance to the United States, and from such inferred lack of allegiance in turn inferred that appellant committed fraud in taking the oath of allegiance twelve to thirteen years previously. Denouncing such process of reasoning as mere conjecture, the Supreme Court of the United States says in

U. S. v. Ross, 92 U. S. 281:

> "It is obvious that this presumption could have been made only by piling inference upon inference, presumption upon presumption * * *. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Evidence, p. 80, lays down the rule thus: 'In the first place, as the very foundation

> of indirect evidence is the establishment of one or more facts from which an inference is sought to be made, the law requires that the latter should be established by *direct* evidence as if they were the very facts in issue.' "

The above language is quoted with approval in *Manning v. Insurance Co.* 100 U. S. 693, 698.

The *Ross* case is also cited in *Atchison Co. v. Sedillo,* 219 Fed. 686, 135 C. C. A. 358, the court (citing also other cases to the same effect) quoting from *Chamberlayne's Modern Law of Evidence,* § 1029, as follows:

> "The requirement that the logical inference styled a presumption of fact should be a strong, natural and immediate one brings as a corollary the rule that no inference can legitimately be based upon a fact the existence of which itself rests upon a prior inference."

The *Ross* case is also followed in *Smith v. Pennsylvania R. Co.,* 239 Fed. 103, 151 C. C. A. 277.

It follows that the court was not warranted in founding an inference of fraud in 1904 upon an inference of lack of allegiance in 1916 to 1917.

AMONG CONFLICTING INFERENCES THE PRESUMPTION OF LAWFUL CONDUCT AND INNOCENCE OF FRAUD OR WRONG PREVAILS.

The first and most elementary presumptions of our system of law, paramount to all others, are the presumptions of lawful and honorable conduct and innocence of crime, fraud or wrong and the pre-

sumption of the validity of a judgment. It is unnecessary to dwell on the proposition that he who charges crime, fraud or wrong has the burden of proving such charges, in civil cases by a preponderance of the evidence, and in criminal cases beyond a reasonable doubt. In cases of fraud particularly, and more especially in proceedings for the cancellation of a public grant, to which naturalization is analogous, the rule is universal that the proof must be strong, clear and convincing (*U. S. v. Albertini,* 206 Fed. 133; *U. S. v. Cal. Midway Oil Co.,* 259 Fed. 343, 352).

Now how has the District Attorney undertaken to sustain this burden in the case at bar? How has he undertaken the burden of proving by a preponderance of the evidence and by strong, clear and convincing proof any fraud or lack of good faith in 1904? By any direct evidence of fraud or lack of good faith shown to have then existed? No. By any acts or declarations at or near or prior to that time? No. How then? Let us again quote the District Attorney's own statement of the proof:

> "The acts of appellant proved to have been committed in the years from 1914 to * * * 1918 *cannot be taken but showing* [an inference] a clear [then existing] allegiance to the German Emperor," etc.

Now what are the "acts" in 1914-18, from which "allegiance", as distinguished from expressions of opinion, is thus sought to be inferred? In 1916, prior to the entry of the United States into the

war, appellant published a book containing "a brief and sincere expression of my [appellant's] feelings and opinions, together with indisputable 'facts' regarding the great international struggle now going on in Europe". The judge and the District Attorney both charge that appellant "admits" that his book was intended as "propaganda," as though there were anything wrong in propaganda. Do they really know the meaning of this term? Did not the anti-slavery movement, the prohibition campaign and the woman-suffrage movement constitute propaganda? And were not most vigorous propaganda published and circulated in enormous quantities in behalf of Belgium, France and Great Britain in 1914-1916 by many of our foremost citizens? Were they therefore disloyal? The District Attorney also actually accuses appellant of voluntarily going to the proper authorities, to the District Attorney himself, and asking his opinion as to "whether or not it would be proper to sell the book now that the United States and Germany were at war" (Tr. p. 333). To whom else should appellant more properly have gone for an opinion as to his rights and duty? Furthermore, appellant of his own volition delivered to the District Attorney all the books he had left (Tr. pp. 320, 336). The District Attorney is in error in his statement (p. 11) that appellant offered copies of the book to be read after the United States entered the war. The incident referred to was when witness Jane Ludwig "went there at first," which was March 27, 1917

(Tr. pp. 267, 268). And we are unable to find anything in the record to justify his statement that after we entered the war appellant was planning to reach Germany, either through Mexico or otherwise. The accusation concerning a change of taste for a good cigar is really ludicrous. The expression was used in the course of argument as a "simile" just as (on p. 250) appears, "metaphorically speaking", the exchange of an old coat "for a newer and better one". The District Attorney, after having determined to institute these proceedings, wrote appellant to bring him his certificate of naturalization, which appellant very promptly did (p. 358). Comparison is invited.

The opinion of the court below we would rather refrain from discussing in detail. We conceive it to be far from the calm, dispassionate and judicial discussion which a judicial opinion should be. Many of its charges against appellant are wholly without any evidence to support them. It is based almost entirely on appellant's *ante bellum* book (the evidence of oral expressions being practically dismissed from consideration—Tr. p. 193) and denounces as falsehoods historical statements therein, the real truth as to many of which is yet to be determined by impartial historians, if after this world-wide conflict such ever will be found. And with the judge's statement that "the hatred exhibited in it against Great Britain and the peculiar affection displayed toward 'down-trodden Ireland' are such as are rarely to be found elsewhere than in the heart

of the Hun," we must respectfully disagree. For a hundred years have been heard and read throughout the country the campaign and other threats of "twisting the British lion's tail", and for a hundred years have propaganda been made by some of our best citizens for the freedom of Ireland, during all of which period this country has been a haven of safety for political refugees from Ireland.

For a few of the many commendations of appellant's book "purposely selected * * * from those whose sentiments are decidedly for the cause of the Allies", see transcript, pages 52-58. For an extraordinarily broad and capable, though for the present sordid era a too altruistic, vision and suggestion for permanent peace, see transcript, pages 173 et seq. The good motive which actuated appellant in publishing the book is so apparent that "he who runs may read", notwithstanding that in the light of subsequent events one may disagree with some of appellant's premises. In addition, the law presumes honest motives and good intent. And for appellant's own status toward his adopted country before and after its entry into the war, in addition to the references in our opening brief (pp. 9 to 12), see, regarding appellant's offers of his professional services to the Red Cross, etc., transcript, pages 185 and 186.

But, to return to our argument, is there any evidence in the record of any overt act against the United States at any time? Is there any evidence of any act intended to, or which would or did, give

aid or comfort to its enemies? Is there a particle of direct evidence of acts of disloyalty to the United States? Is it disloyal, when our country is not at war, to have sufficient intelligence to give expressions of opinion as to the justice or injustice of the cause of certain of the belligerents, or as to the justice or injustice of the acts of certain officers of our own government toward one or the other of the belligerents? Is it disloyal, in such case, by means of argument and expressions of opinion and reasoning to endeavor to bring about a reformation? Assuredly not. Where, then, is the evidence of disloyalty?

But suppose we should, without conceding anything, but solely for the sake of argument, assume that lack of allegiance might be inferred from appellant's acts and declarations in 1916-17, and that lack of good faith might therefrom in turn be inferred to have existed in 1904 (surely extremely far fetched), even such inferences would still come in direct conflict with the greater and paramount presumptions of lawful intention and conduct and innocence of crime, fraud or wrong.

> "The presumption of innocence and good faith is one of the strongest, and always prevails over one giving rise to an inference of guilt or bad faith [citing many cases]. Or, as expressed in *West v. State,* 1 Wis. 210, 216, presumptions are 'to be used in the administration of justice as a weapon of defense, not of assault'."

Coffman v. Christenson, 102 Minn. 460, 465.

> "Fraud cannot be presumed. The law presumes that every person is honest until the contrary appears, and in this transaction the court must assume that the individual defendants were, in working the transformation, actuated by honesty of purpose. Even though it be held that the defendants' proceedings were in violation of law, it does not necessarily follow that they were fraudulent, or with an improper motive. Men sometimes proceed contrary to law in the best of faith and with the best of motives."
>
> *Shera v. Merchants L. I. Co.,* 237 Fed. 484; *Jones v. Simpson,* 116 U. S. 615.

In *Wilcox v. Wilcox,* 171 Cal. 770, concerning the conflict between the presumption of continuance of a thing shown to exist and the presumption of innocence, the court says (p. 773):

> "But, as was said in *Hunter v. Hunter,* 111 Cal. 261, 267: 'The presumption of the continuation of life is, however, overcome by another. It is presumed that a person is innocent of crime or wrong' * * *. These cases must be taken as establishing it to be the law * * * that the *prima facie* presumption in favor of the validity of the marriage assailed outweighs the presumption of the continuance of life of the former husband or wife."

Judgment reversed.

In *U. S. Ross,* supra, the Supreme Court of the United States held similarly that

> "the presumption that public officers have done their duty is not sufficient to supply the proof of a substantive fact"

essential to sustaining the burden of proof. Judgment for the government was reversed.

> "If the circumstances proven are just as consistent with honesty and good faith as with a fraudulent intent, the inference of fraud is not warranted. In short, where two inferences can be drawn from proven facts, one in favor of fair dealing and good faith and the other of a corrupt motive, it is the duty of the trier of fact to draw the inference favorable to good faith and fair dealing."
>
> *U. S. v. Cal. Midway Oil Co., supra.*

The above cases refer mostly to conflicting presumptions. Aside from this, an inference, such as is endeavored to be inferred in the case at bar, is infinitely weaker than a presumption, for when an inference comes into conflict with a presumption or with direct controverting evidence, the inference must fall. Here the District Attorney presents nothing more than an inference, a mere conjecture, that appellant lacked good faith in taking the oath of allegiance in 1904. This inference is controverted, not alone by the presumption of innocence of wrong, but also by appellant's direct testimony (p. 287).

> "When I made said oath [of allegiance] I meant every word and syllable of it, and do so now, and I have shown by my acts and actions that I have always meant every word and syllable of that oath."

In the recent case of *Everett v. Standard Acc. Ins. Co.,* 31 Cal. App. Dec. 56, the court says (p. 60):

> "Where evidence is offered controverting the inference which might ordinarily be drawn under the circumstances, the jury is bound to

> find according to the controverting evidence. * * * The law presumes that he did not commit bigamy, that he did not commit perjury * * * and that he did not commit fraud when he procured the policy of insurance."

See also *Maupon v. Solomon,* 28 Cal. App. Dec. 1231, rehearing denied by Supreme Court in 58 Cal. Dec. 83, reversing a judgment based solely on an inference, it being contradicted by direct controverting evidence. So, in the case at bar, the District Attorney's inference—if it can be so dignified—of lack of good faith in 1904 is controverted, not alone by direct controverting testimony, but also by the strongest presumptions known to the law, before which the inference must fall.

See also

In re Pusey, 173 Cal. 141;

Estate of Hughson, 173 Cal. 448, 453.

Not one of the cases cited on page 16 of the District Attorney's brief was founded on an inference, or even on a presumption. In each case there was direct testimony as to specific facts or conditions, proven by direct testimony to have existed at the time of naturalization. These cases in reality confirm our claims as to the insufficiency of the evidence here, where no direct testimony of fraud or illegality was produced, in fact, nothing but the merest conjecture as to the state of appellant's mind or intent in 1904.

It thus conclusively appears that the District Attorney has not sustained the burden of proving by clear and convincing proof any fraud committed in 1904, his attempt to do so through inference founded upon inference from other acts alleged to have been committed in 1916-17 failing, for each of the following reasons:

1. Presumptions of continuance of existence are prospective, not retrospective;

2. An inference cannot be founded upon an inference;

3. As between conflicting presumptions or inferences, the presumption of good faith and motive, of compliance with the law, and of innocence of fraud, crime or wrong, as well as of the validity of a judgment or decree, prevail.

Respectfully submitted,

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